

EXHIBIT B

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

3 LLOYD BELL, individually and) CASE NO. 1:17CV111
4 As executor of the estate of)
5 BETTY WHITLEY BELL, deceased,)
6)
7 Plaintiffs,)
8)
9 V.)
10)
11 AMERICAN INTERNATIONAL)
12 INDUSTRIES, et al.,)
13)
14) Winston-Salem, North Carolina
15 Defendants.) September 25, 2020

16 **CORRECTED** TRANSCRIPT OF THE **TELEPHONIC MOTIONS HEARING**
17 BEFORE THE HONORABLE JOI E. PEAKE
18 UNITED STATES MAGISTRATE JUDGE

19 APPEARANCES (By telephone):

20 For the Plaintiffs: WILLIAM M. GRAHAM, ESQ.
21 WALLACE & GRAHAM, P.A.
22 525 North [REDACTED] Street
23 Salisbury, North Carolina 28144

24 FRANK J. WATHEN, ESQ.
25 LEAH C. KAGAN, ESQ.
 SIMON GREENSTONE PANATIER PC
 1201 Elm Street, Suite 3400
 Dallas, Texas 75270

For the Defendants:
AII:

ROBERT E. THACKSTON, ESQ.
KURT W. GREVE, ESQ.
SAMUEL GARCIA, ESQ.
LATHROP GPM LLP
2101 Cedar Springs Road, Suite 1400
Dallas, Texas 75201

1 APPEARANCES Continued (By telephone):

2 For the Defendants:

3 Brenntag North America: TRACY E. TOMLIN, ESQ.
4 Whittaker Clark BENJAMIN S. CHESSON, ESQ.
NELSON MULLINS RILEY & SCARBOROUGH LLP
5 301 South College Street, Suite 2300
Charlotte, North Carolina 28202

6 Colgate-Palmolive: MATTHEW R. SCHROLL, ESQ.
NELSON MULLINS RILEY & SCARBOROUGH LLP
7 2 South Biscayne Boulevard, 21st Floor
Miami, Florida 33131

8 Cyprus Amax: TIMOTHY PECK, ESQ.
9 FOX ROTHSCHILD LLP
P.O. Box 21927
10 Greensboro, North Carolina 27420

11 Neslemur Co.: JOE CARRUTHERS, ESQ.
WALL BABCOCK, LLP
12 1076 West Fourth Street
Winston-Salem, North Carolina 27101

13
14 Transcriber: BRIANA L. BELL, RPR
United States Court Reporter
15 P.O. Box 20991
Winston-Salem, North Carolina 27120
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P R O C E E D I N G S

THE COURT: All right. Good morning. This is Judge Peake.

Ms. Kemp, do I have the call?

COURTROOM DEPUTY CLERK: Yes, Your Honor.

THE COURT: All right. Very good. Good morning to you.

COURTROOM DEPUTY CLERK: Good morning, Judge Peake.

THE COURT: All right. So what I am going to do is first note we're here in Case 17CV111. And as is my usual practice, I will start by finding out who is on the call for each of the parties and who is going to be handling the matters today.

So let me start first with the Plaintiff.

MS. KAGAN: Good morning, Your Honor. My name is Leah Kagan from Simon Greenstone Panatier on behalf of the Plaintiff, and I'm joined with my cocounsel, Frank Wathen, from my law firm, and we will together be handling the motions, although I suspect I will be arguing most of them.

THE COURT: All right. And did we have local counsel as well?

MR. GRAHAM: Your Honor, good morning. It's Bill Graham at Wallace & Graham for Ms. Bell as well.

THE COURT: All right. Very good.

MR. GRAHAM: Thank you.

1 **THE COURT:** All right. As to the Defendants, AII?

2 **MR. THACKSTON:** Good morning, Your Honor, Robert
3 Thackston for AII.

4 **THE COURT:** All right. Very good. Anybody else here
5 with you, Mr. Thackston?

6 **MR. THACKSTON:** Yes, Your Honor. I have a client
7 representative, Brian Dror, and then also counsel with me from
8 my firm are Kurt Greve and Sam Garcia, but I believe I will be
9 doing the talking.

10 **THE COURT:** Okay. Very good.

11 As to Colgate-Palmolive?

12 **MR. CHESSON:** Good morning, Your Honor. This Ben
13 Chesson from Nelson Mullins down in Charlotte, and Matt Schroll
14 is on the phone as well from Nelson Mullins, and I believe Matt
15 is going to be handling the majority of the speaking from our
16 side.

17 **THE COURT:** All right. And let me -- so remind me
18 again, Mr. Chesson, who is with you?

19 **MR. CHESSON:** Matt Schroll is with me from Nelson
20 Mullins as well.

21 **THE COURT:** Okay. Very good.

22 **MR. CHESSON:** Mr. Schroll is going to handle the
23 majority of the argument for our side.

24 **THE COURT:** Okay.

25 All right. For Cyprus?

1 **MR. PECK:** Good morning, Your Honor. It's Tim Peck
2 from Fox Rothschild.

3 **THE COURT:** All right. Very good.

4 And for Whittaker Clark & Daniels?

5 **MR. PECK:** Good morning. This is Tracy Tomlin
6 representing Whittaker Clark & Daniels.

7 **THE COURT:** Very good.

8 And do we have the folks for Neslemur here today as
9 well?

10 **MR. CARRUTHERS:** Joe Carruthers, Your Honor.

11 **THE COURT:** All right. Very good.

12 All right. We have multiple motions on today.

13 Again, I appreciate the joint status report. We've been here
14 several times before.

15 As you know, my usual practice is to allow everyone
16 to be fully heard and then make decisions as we go; but given
17 the number of times we've met before and some concern that
18 there may have been some breakdown in communication here and
19 just trying to get things back on track, what I'm going to do
20 is just give you some general thoughts before we get started,
21 and then I will let you know how I've organized things and my
22 initial thoughts. And then I will let each of you be heard
23 briefly if there is anything new to add or anything else you
24 want to be heard on those things.

25 So before we begin, I'll let you know I've read

1 everything that you all have filed. At this point there's
2 3,000 pages sitting here on the bench with me. I do not find
3 any bad faith or basis for sanctions, and any requests for
4 sanctions or requests for motions back and forth along those
5 lines really I don't find very helpful or persuasive at this
6 point.

7 So I'm just going ahead and letting you know now the
8 only potential sanction that I am looking at is the possibility
9 of whether I need to require local counsel to sit in on all
10 these depositions or to be the ones responsible for filing
11 discovery motions going forward; and I will wait until the end
12 of the hearing and then make some decision if we need to do
13 that or not in this case.

14 My goal right now today is to just resolve whatever
15 disputes remain in place. I've identified three areas I need
16 to address. So what I am going to do is just start with
17 letting you know what those issues are and how I've organized
18 them and what my initial thoughts are on that.

19 So, first, as to Nos. 161 and 190 -- this is
20 Plaintiffs' motion to quash as to Lab/Cor and Defendant AII's
21 motion to compel. On that one, I just want to, as we go
22 through, confirm that all of the records that have been agreed
23 to have now been provided and confirm that all videos have been
24 produced and whether there is any need for an affidavit from
25 Mr. Fitzgerald on that or any other videos for any other

1 experts.

2 As to whether to allow a limited deposition of
3 Mr. Harris, particularly limited just to the facts surrounding
4 his testimony -- or, excuse me, his testing, not any opinions,
5 but just his testing, and that would be a one- or two-hour sort
6 of limited deposition.

7 I want to address the dispute regarding the time
8 limit for what remains for Dr. Fitzgerald. It looks like
9 additional time might be warranted in light of the late
10 disclosure of the videos, but I also noted in the joint Rule
11 26(f) report you had all stipulated to no limits on expert
12 depositions with respect to the time limits that might
13 otherwise apply. So if there is a good cause showing to change
14 that, we can address that, but, otherwise, that would be the
15 stipulation that was agreed to and adopted in the scheduling
16 order in this case.

17 There are also local rules with respect to
18 depositions, and I call your attention to those, particularly
19 30.1 in this case.

20 With respect to Document No. 168, Plaintiffs' motion
21 to quash as to Northwell, and 179, the motion for protective
22 order as to Dr. Moline and the related motions to seal, I don't
23 find any bad faith or unreasonable conduct. [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED] It looks like Plaintiffs' counsel
2 just referred defense counsel to Northwell to obtain that.

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED] [REDACTED]
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21 [REDACTED]

22 It also seems to me that with respect to the rest of
23 the information requested from Northwell, that could be the
24 subject of party discovery regarding the designated experts;
25 and so it looks to me like we may not need further subpoena

1 from Northwell, but that would be without prejudice to getting
2 that information in expert discovery, if it's appropriate and
3 within the scope of the rules. So we can talk about that.

4 As to the motions to seal, I think it's appropriate
5 to treat this as confidential information limited to the
6 present suit. To the extent we would take this up separately
7 when dispositive motions are filed or at trial, then you would
8 have First Amendment protections with respect to the court's
9 public record; and those would definitely require a higher
10 standard to overcome, and that's going to be something the
11 district judge will need to consider in this case.

12 But when we're talking just about discovery motions
13 and filings related to discovery, we don't have those same
14 level of First Amendment protections. Here, this is related to
15 medical information or expert discovery, and I am going to
16 treat that as confidential and limited to the case for purposes
17 of discovery, but without making any finding with respect to
18 filings on dispositive motions or at trial.

19 And, specifically, that means because Plaintiff is
20 claiming it's confidential, you all would need to file Local
21 Rule 5.4, file motions to seal, and then have that heard and
22 resolved by the district judge, if that is necessary to be
23 filed at some point related to dispositive motions or trial.

24 As to Colgate-Palmolive's motions and scheduling
25 generally, it looks like that that was raised or necessary

1 because of some delays in the dates for Plaintiffs' expert
2 depositions. So in that sense, I would treat that as a request
3 by Plaintiff to be able to have their experts deposed out of
4 time since their experts were not provided within the deadline
5 of September 21st. If there is agreement to allow those
6 depositions late, as long as the dispositive motion deadline is
7 extended, I can consider that with some time coming out of both
8 Plaintiffs' response time and Defendant's briefing time on
9 that.

10 And then as to Dr. Attanoos -- it looks like
11 Dr. Geyer, the designated expert for now, it may be necessary
12 for Colgate-Palmolive to request leave to substitute prior to
13 trial, if Dr. Geyer is not available.

14 On the one hand, I don't disagree that some of that
15 can be resolved later closer to trial once you know if
16 Dr. Geyer is going to be available or not, but to the extent
17 it's helpful now, I can tell you that, as to Dr. Attanoos as an
18 alternative, I have not ever tried to supervise tax compliance
19 on a party's expert. I don't intend to try to do that. I also
20 don't generally exercise jurisdiction over experts, whether
21 they're outside of North Carolina or the U.S. I exercise my
22 jurisdiction over the parties to the case.

23 So if there are restrictions we need to put on
24 Colgate with respect to what they might do or ask their expert
25 to do, we can do that subject to all the ordinary spoliation

1 rules that would apply, but, otherwise, I don't see any issue
2 with Dr. Attanoos. And what I would suggest is going ahead and
3 letting Dr. Attanoos have the information, prepare a report for
4 the alternative, if Dr. Geyer is not available, but then
5 reserving any final determination on a request to substitute
6 and whether that would be ultimately necessary and how that
7 might look for the spring, although, I will tell you, it will
8 need to be resolved by February 15th, I think, to keep you on
9 track, either a deposition of Dr. Geyer by then or a motion to
10 substitute for the trial judge to consider.

11 I have, again, gone through all of that as a
12 preliminary matter, not because I don't want to hear you, but
13 because I think it will help to focus our conversation and keep
14 things on track for what the actual disputes might be that
15 remain and the things that we need to address today.

16 I am going to keep them generally in that order with
17 respect to how we're taking those things up, so for
18 Colgate-Palmolive and the scheduling issues, I'm going to save
19 that for last.

20 I will start first with the AII issues and beginning
21 with the Lab/Cor issue and AII's motion to compel, which are
22 Documents 161 and 190.

23 And, Mr. Thackston, since it's your motion to compel,
24 I am going to hear from you first, and then I will go back to
25 Ms. Kagan on that.

1 **MR. THACKSTON:** Thank you, Your Honor, Robert
2 Thackston for AII.

3 Your Honor, overlaying all of this is the fact that
4 there's two different kinds of testing: One is bulk sampling,
5 what's in the powder. Number two is air sampling, what's in
6 the air that the Plaintiff can allege that Mrs. Bell breathed
7 and contributed to her mesothelioma.

8 So in this case, there is one container of Clubman
9 talc. There's no allegation that my client made it. It was --
10 my client bought the brand in 1987. This is an old metal can
11 of unknown origin.

12 That can -- Mrs. Bell -- the evidence I think is
13 undisputed. Mrs. Bell -- or her lawyers provided that can to
14 Mr. Fitzgerald in Greensboro. Mr. Fitzgerald took some of
15 it -- he's a geologist, and he took some portion of it, put it
16 in test tubes, and gave it to Mr. Segrave, who is an expert
17 hired by AII. This all occurred in the New Jersey case back in
18 2015.

19 So Mr. Fitzgerald gave a report in the New Jersey
20 case, and we were aware that Mr. Fitzgerald had done both the
21 bulk sample test and what he claims is an air releasability
22 test, which we'll talk about, but, basically, he's manipulating
23 that can inside of a glovebox in a manner that he claims is
24 consistent with how Mrs. Bell used it.

25 So skip forward to this case, we see in March of 2020

1 the Plaintiffs filed expert designations, and they did not list
2 Mr. Fitzgerald, and they listed Dr. Compton, who is in Atlanta.
3 When they produced Dr. Compton's reliance materials, it
4 mentioned in the chain of custody for the can -- he had also
5 done tests on the can. So it mentioned Lab/Cor and John
6 Harris, and this is a lab out in Seattle.

7 And we have Dr. Moline's report. She says that
8 she -- that it has been confirmed by three different
9 laboratories that there was asbestos in the container, the can,
10 that Mrs. Bell had.

11 And you will recall that the first hearing we had
12 here was our motion to compel production of a can, right,
13 because we want to figure out exactly what has happened with
14 this can and how much of the material has been used.

15 So we're aware of the bulk sample with
16 Mr. Fitzgerald, but we weren't aware that the can then went --
17 well, that Mr. Fitzgerald did destructive testing on the
18 product, right. And so this is a product liability case and
19 the product is that can, even though it's not an AII product.
20 It's what Plaintiffs claim is relevant physical evidence in
21 this case, that can.

22 So they destroy some portion of that material in
23 doing these air tests. I don't think -- I got the Plaintiffs'
24 response this morning, and they said no material was destroyed;
25 but Mr. Fitzgerald, who we deposed last week, said, Yeah, I

1 mean, we didn't put -- whatever we used, we didn't put back
2 into the can. And he can't tell us how much he used.

3 So then the material -- we find out this year the can
4 apparently goes to Mr. Harris. We don't know what Mr. Harris
5 did, but he issues a report in 2016 through Plaintiffs'
6 counsel, same Plaintiffs' counsel in this case, and he says he
7 found asbestos in this white can as well, and he apparently did
8 a releasability or air sampling test and destroyed some of it.
9 Again, I'm not aware of any notice to AII's counsel or AII that
10 destructive testing was going to be done by Mr. Fitzgerald or
11 Mr. Harris. Then the product apparently goes to Dr. Compton in
12 Atlanta, who then does a third set of testing.

13 So Mr. Harris and Lab/Cor are in the chain of custody
14 of this can. We don't know exactly when it went to him. We
15 don't know what he did. Plaintiffs say that, well, it doesn't
16 matter because it's all consistent.

17 Well, first of all, it matters because if they're
18 going to try to get into evidence, which they obviously are,
19 these two so-called releasability tests, then we would
20 obviously need to know how much was released and how was it
21 released.

22 That's the whole issue with the videotapes, which I'm
23 not going into right now, but the chain of custody of the
24 physical evidence in the case went from Fitzgerald to Harris to
25 Compton, and what exactly happened at each stage is very

1 important.

2 And Mr. Harris at Lab/Cor apparently found a
3 different kind of asbestos called anthophyllite, but he lost
4 the fiber. He said he had a microscope malfunction that caused
5 him to lose the anthophyllite fiber, so he's reporting on
6 tremolite.

7 So the Plaintiffs have two experts, Compton and
8 Moline, both specifically saying that they're relying upon the
9 Lab/Cor report. They now have a can. They're apparently going
10 to finally let us look at it maybe next week, look at it only;
11 but Mr. Fitzgerald didn't weigh the can. He couldn't tell us
12 how much he started with. He couldn't tell us how much he
13 used. He couldn't tell us how much he ended with. We went
14 through all the different ways. You could have just measured
15 the container before your test and measured it after the test,
16 and that might not be the most scientific way, but you could
17 have at least done that. He didn't do that.

18 So they claimed to have done these tests in a way
19 that replicate the way that Betty Bell would have used the
20 product. Well, we spent some time with Mr. Fitzgerald talking
21 about all the reasons why that's false; first of all, that it's
22 in a box.

23 But Mr. Harris, apparently, and Lab/Cor, they say
24 that their assistant put the powder all over somebody's arm
25 inside of a box. And there's no allegation -- Mrs. Bell

1 alleges that she used it on a brush to brush off someone's neck
2 after a haircut. So why he would do a test pouring it all over
3 someone's arm is a mystery and whether he videotaped that so we
4 could see -- so we could show just how dissimilar it is to what
5 Ms. Bell actually said that she did with the product.

6 So I don't think calling this person a consulting
7 expert fixes the problem when that consulting expert is in the
8 chain of custody as a physical product -- the physical evidence
9 in the case. I think the consulting expert cases that the
10 Plaintiffs cite, none of them had anything to do with someone
11 who actually handled the product and was in the chain of
12 custody.

13 And the second is this would be a classic case of
14 exceptional circumstances. Even if he were a consulting expert
15 and his material otherwise protected, these are the exceptional
16 circumstances where there's no way the Defendant can otherwise
17 have access to this kind of information. It's the physical
18 custody of the product and what he did with it to preserve it
19 when he got it, how much of it he disposed of.

20 And I think the fact that they didn't give notice to
21 the Defendants that they were going to do destructive testing
22 of this product is another factor weighing in favor of allowing
23 the discovery of the information, but we don't know how much he
24 used, we don't know how he used it, and then we don't know what
25 he did with the product after that.

1 So I think those are all circumstances justifying
2 that the full file be produced, and I'm not aware of our having
3 received anything. Plaintiffs' counsel say that they are
4 trying to get in touch with him, and the fires in California
5 are keeping him from producing this; but this happened over
6 four years ago, and it was specifically requested in written
7 discovery that the Plaintiffs just blew off. They objected to
8 it, said it would be provided by way of expert testimony -- or
9 expert designations and expert productions, but since they
10 claim that he's a consulting expert, none of it was provided.

11 I really needed it to cross-examine Mr. Fitzgerald.
12 I will need it to cross-examine the rest of their witnesses who
13 claim they rely upon this chain of custody -- I mean, this
14 report, and for Dr. Compton, to talk to him about the chain of
15 custody, since this same can has now been from Greensboro to
16 Seattle to Georgia.

17 **THE COURT:** All right. That's good, Mr. Thackston.
18 I think I understand your position on that.

19 I'm going to go through all the different pieces I
20 have as far as -- related to this to make sure we've covered
21 everything before I go to Plaintiff on that.

22 The first note I had was confirming whether the
23 records that have been agreed to have been provided. It sounds
24 like you don't yet have the records. There may still be some
25 delays out there on the West Coast, but you don't have those

1 yet; is that right?

2 **MR. THACKSTON:** That's right, Your Honor.

3 **THE COURT:** And then with respect to the deposition
4 of Mr. Harris, I have a less concern about the destructive
5 aspect of it because my understanding is that these -- the
6 sample was divided, and Defendant was given their sort of
7 portion of it prior to the Plaintiff testing going forward.

8 I understand in some cases where you've got
9 destructive testing and there's no sample left, then that
10 becomes a basis for exceptional circumstances. I think here my
11 focus is more the first part of your argument, which is the
12 chain of custody, the way that the testing went, some of -- any
13 details about that that then was put into the report or at
14 least was the basis for the report that was then relied upon by
15 the testifying experts.

16 It does look like there is case law supporting the
17 notion that that would provide exceptional circumstances, but I
18 would want to be careful to make sure we're limiting it there
19 to that aspect and not some issue of determining whether he had
20 some inconsistent opinions or what his opinions might be of the
21 other testifying experts' opinions or things well afield of
22 that, which I think would unnecessarily invade the protection
23 for nontestifying experts.

24 **MR. THACKSTON:** Your Honor --

25 **THE COURT:** I will stop with that and let you all

1 respond to that.

2 **MR. THACKSTON:** Well, the question of whether giving
3 us a sample fixes the destructive part of the testing, that's
4 fine for bulk sampling. We can bulk sample what -- the portion
5 they gave us, but for the air release test, those are done with
6 the can. The can is used, and they shake out a certain amount
7 from the can. How much you get, how fast you get it, how you
8 shake the can, how long you shake the can, and what you do with
9 it once you get it out, we can't replicate that. We don't know
10 what they did. That goes to the issue of the videotapes. We
11 don't know what they did. We can't do it. We've never had
12 possession of the can. We never will have possession of the
13 can.

14 So the fact that they gave us a small portion for
15 bulk sampling doesn't fix that part of the sampling and our
16 inability to know what they did or to replicate it.

17 **THE COURT:** Okay. That's helpful.

18 What about the second part of that in terms of how
19 we -- because I think that's still consistent with limiting it
20 to the information about how he did the testing and what he did
21 as opposed to any opinions of his?

22 **MR. THACKSTON:** Well, Your Honor, if they're not
23 going to rely on any opinions of his, then that's a fair use of
24 someone as a consulting expert; but if they are going to rely
25 on the opinion and say he found -- he says he found X, then I

1 should be able to get into, well, what makes you think that is
2 X? Because whether something they see under a microscope is
3 actually asbestos is certainly a subjective determination, and
4 it depends on the methodology that they're following and their
5 expertise, and that makes things like standard operating
6 procedures and his training relevant to the inquiry.

7 **THE COURT:** So maybe it's more helpful to be specific
8 and state his opinion as to whether it was asbestos or not or
9 what he saw as opposed to any opinion he might otherwise have
10 regarding what that means or Ms. Bell's case or the other
11 opinions that then other experts may have offered.

12 **MR. THACKSTON:** Yes, Your Honor, that would be fair.

13 **THE COURT:** Okay. All right.

14 The other notes I have related to this No. 190 was
15 the dispute regarding the time limit for Mr. Fitzgerald's
16 remaining deposition.

17 Have you all resolved that yet?

18 **MR. THACKSTON:** No, Your Honor.

19 **THE COURT:** Is it your understanding still that you
20 all had waived the time limits for expert depositions?

21 **MR. THACKSTON:** Yes, Your Honor, that's my
22 understanding, and I specifically tried to raise that in the
23 meet-and-confer, that the rules governing this case do not have
24 a time limit for experts. I tried to say that in the
25 meet-and-confer.

1 **THE COURT:** All right. And then I think that may be
2 it with respect to No. 190, but you tell me. Is there anything
3 else that we would need to address with regard to the motion to
4 quash as to Lab/Cor and the motion to compel that you filed?

5 **MR. THACKSTON:** As long as we're not rolling up the
6 video for Fitzgerald issue into that, then that would be all of
7 it.

8 **THE COURT:** Okay. Well, since that was in 190, I
9 guess, the videos as to Mr. Fitzgerald, my understanding was
10 they had provided those and confirmed that there were not any
11 others.

12 I understand that there was the concern raised
13 earlier that they hadn't been provided, and it wasn't
14 investigated or determined what may have happened until his
15 deposition. And so I would be inclined to give you additional
16 time with him if you needed that, but if we're not subject to
17 any time limits for expert depositions anyway, then I don't
18 know that there is anything else we would need to address with
19 that, but you tell me.

20 Anything else as to that?

21 **MR. THACKSTON:** Well, yes, Your Honor, because we
22 don't have a clear answer on whether there really were
23 videotapes.

24 Fitzgerald said -- and this is why you ask it in an
25 interrogatory and a request for production, too, to try to get

1 clear what videotapes exist or any test that you are going to
2 rely upon for Clubman. We tried to ask that, I think, separate
3 from expert disclosures and discovery, but the Court allowed
4 them to defer that until the time of answering the -- providing
5 the expert materials.

6 So Mr. Fitzgerald's report said in 2016 that he
7 videotaped these releasability studies. So this is what he
8 does in the glovebox. He said he videotaped it. And on page
9 48 of his report from June 29, 2020, he says, again, videotapes
10 of this -- of these tests available upon request.

11 Well, at the time they -- at the time that they send
12 out Fitzgerald's report in June of 2020, we not only asked --
13 in the written discovery from October of last year, we've not
14 only asked about the videotapes, but we've had a motion to
15 compel it. The Court has specifically brought it to their
16 attention. There's been a representation that all videos will
17 be produced as part of the expert discovery. And he says at
18 that point there are videotapes, but these are things that our
19 experts really and fairly should have been able to see to see
20 what they did to get these numbers.

21 So during the deposition, the first position is,
22 well, we gave it to you. We gave you a link. And so we spend
23 time going through the link trying to find it, and then,
24 finally, he says, Okay, I didn't give it to you in a link; I
25 will see if my assistant can find it. And I said, Have you

1 ever been asked before to provide these videotapes? And he
2 said no.

3 So we have that, and then the report says they exist.
4 So we're looking for the four tests, and so we asked for uncut
5 videos of everything he did with Clubman testing. What we get
6 instead -- and the report talks about how long the test went
7 on. What we get instead -- there are four things he did:
8 Application, then he did a second application, then he did a
9 sweeping, then he did a second sweeping.

10 His report says, I get the highest numbers from my
11 sweeping tests, three and four. And I asked him a number of
12 questions about what he did, and he said every time -- he said
13 many times -- and I can provide the Court with the example --
14 many times: I don't remember. I don't remember. You'd have
15 to look at the video.

16 Okay. So then he produces two what appear to be cut
17 videos from one and two, putting stuff on the mannequin, but
18 they're cut, I think. They're not as long as what he did
19 overall, and one of them -- I mean, it's been altered. One of
20 them has got Clubman video -- Clubman tests superimposed over
21 the thing, so it's obviously not the uncut version.

22 And then I start asking him questions about what he
23 did with the sweeping. I said, Well, did you sweep it into --
24 Did you sweep it into a pile? Was the can still inside of the
25 enclosure? Did you remove it with a dustpan? The second

1 sweeping, were you just sweeping everything around again or
2 were you sweeping what was left? He couldn't answer any of
3 those questions.

4 And then ultimately he said -- he said, I don't
5 remember. I don't remember. And then he said -- I said, Where
6 are the videos? Wouldn't the video be a better demonstration?
7 And then he said at one point in his deposition, Well, if you
8 will just look at the video, it will tell you what I did.

9 So then the story evolved from I gave it to you to I
10 can't find it to, well, there aren't any. So I think we're
11 entitled to an answer in the written discovery from Plaintiffs
12 about whether there -- are there not any because you lost them
13 or you destroyed them or you never videotaped three or four,
14 even though your report in June of 2020 said you did videotape
15 it?

16 This is a really big deal because what they did with
17 the product to get the numbers used to be substantially similar
18 to what happened in the case. It's their burden to prove that,
19 but shame on us if we don't try to fully discover exactly what
20 they did.

21 So I would say that the only way we're going to get a
22 straight answer that we can hold the Plaintiffs to is if they
23 are required to answer the interrogatory that we asked them
24 that explains are there videotapes of tests of Clubman
25 products? If so, list them, explain what exists, and then we

1 can make sure we have that, and we can cross-examine their
2 experts, and we can present them to our experts.

3 **THE COURT:** All right. So boiling that down, it
4 looks like if you have another opportunity to question
5 Mr. Fitzgerald now that you have the videos, you can follow up
6 with him to the extent you need to get further testimony from
7 him. And then in addition, given the failure to having
8 previously disclosed those, the remedy may be to request or to
9 get another answer or a specific answer to the interrogatory as
10 to video to make sure exactly what exists as to each of the
11 experts, if anything, and to have that separately listed out.

12 Is that what you're asking for then on that,
13 Mr. Thackston?

14 **MR. THACKSTON:** Yes, Your Honor.

15 **THE COURT:** Okay. Anything else as to Nos. 161 and
16 190?

17 **MR. THACKSTON:** Not from me, Your Honor.

18 **THE COURT:** Okay. And I did note, with respect to
19 161, the motion to quash as to Lab/Cor, that aspect of it would
20 seem to be mute to the extent you're not pursuing this as a
21 subpoena to Lab/Cor as part of expert or party discovery, and
22 we would be handling it as to No 191.

23 Is that accurate, Mr. Thackston?

24 **MR. THACKSTON:** Yes, Your Honor. If the Court
25 considers that to be the equivalent, if they prefer to deal

1 with it as discovery to the expert and they're going to provide
2 it by way of expert discovery, then I don't think we need to
3 treat it like a subpoena to Lab/Cor; but at the time we did
4 that, I don't think we knew that they were claiming that Harris
5 was a consulting expert. It was just someone in the chain of
6 custody.

7 **THE COURT:** All right. That's helpful.

8 What I am going to do now is -- before we move on to
9 any other motions, let me come to Ms. Kagan, and then we'll see
10 if there is anybody else who needs to weigh in.

11 Ms. Kagan, as to these issues with respect to Nos.
12 161 and 190, let me let you respond to any of those things and
13 give me your position on the particular disputes that remain.

14 **MS. KAGAN:** Thank you, Your Honor.

15 I can separate out the two experts and address
16 Mr. Harris first.

17 **THE COURT:** Okay.

18 **MS. KAGAN:** As we laid out in our motion to quash the
19 Harris subpoena, Mr. Harris has never been disclosed under Rule
20 26 as an expert. He has always remained as a consulting
21 expert.

22 The can of Clubman that was provided to him was
23 provided to him, as the Court noted, after counsel for AII had
24 their expert collect aliquots of talc from that can, and
25 anything that Mr. Harris did did not destroy AII's opportunity

1 to collect talc or to conduct any testing.

2 I thought it was interesting that Mr. Thackston
3 claimed that using the can itself in a simulated exposure study
4 somehow destroyed evidence that they don't have access to. The
5 evidence is the talc itself, right. That's what's being used,
6 and they were given samples of the talc. Their expert offered
7 a report and offered opinions on their samples of talc before
8 Mr. Harris was ever involved in consulting on this case, and so
9 the idea that evidence was destroyed is simply not true.

10 The can itself -- to replicate an air test --
11 deposing Mr. Harris or obtain information from Mr. Harris by
12 way of documents does not allow anyone to replicate his test
13 unless you get a can that's the same and then you replicate the
14 test, or you can request the can to do the test.

15 At this point in time, AII has never requested the
16 can so that they could do their own simulated analysis. In the
17 years that this case has languished, they have never made that
18 request to do their own air simulation, and, in fact, their
19 designated expert, Mr. Segrave, is not qualified to do such a
20 test. He is no longer employed by any laboratory. He has
21 nowhere to do such a test.

22 So the idea that we have destroyed evidence and
23 prevented AII from replicating an air test by not disclosing
24 Mr. Harris as an expert is -- I can't make the logical link
25 there, but what we did do is we disclosed the facts in data.

1 We disclosed Mr. Harris' findings, even though we chose not to
2 disclose him as an expert in this case.

3 And the idea, again, that we were evidence shopping
4 and that would somehow create exceptional circumstances that
5 would warrant the deposition of a nontestifying expert under
6 Rules 26 and 30 is, again, inconsistent with what the facts are
7 in this case. We didn't hide that evidence. We didn't go to
8 multiple different laboratories looking for good evidence and
9 not disclosing bad evidence.

10 All three laboratories that we sent this can to all
11 found the same thing. They found amphibole asbestos in the
12 talc samples by bulk testing and by air testing, and they found
13 the same type of asbestos, tremolite asbestos.

14 And so we could disclose Mr. Harris as an expert.
15 There's nothing harmful in his testing. We disclosed his
16 testing, but we don't intend to rely on it or him, and that's
17 why we didn't disclose him. We provided his report to the
18 other experts in the case as part of the chain of custody and
19 documentation in the case, but no expert in the case actually
20 relied on any of Mr. Harris' findings. Mr. Fitzgerald
21 certainly doesn't. He came up with his opinions before
22 Mr. Harris ever tested. Dr. Moline issued a report in 2016 in
23 this case before Mr. Harris had ever tested that container.

24 None of our experts actually rely on Mr. Harris'
25 testing; and as a result, this is neither evidence shopping nor

1 attempting to back-door a consulting expert's opinion through
2 testifying experts. As a result, exceptional circumstances
3 have not been met to warrant any type of deposition of
4 Mr. Harris.

5 **THE COURT:** Well, Ms. Kagan, I noticed in one of
6 Dr. Moline's reports she does specifically refer to the notion
7 that three different labs have found asbestos, and one of those
8 cite specifically to Lab/Cor. I think that there is a similar
9 reference as to Compton, but I know I saw it in Dr. Moline's.

10 That does, to me, bring it closer within the idea of
11 where your testifying expert is relying on this report, that
12 they would at least have the ability to find out about the
13 testing and the factual information related to that report that
14 the experts relied on, taking it out of the consulting or
15 nonconsulting expert or otherwise providing exceptional
16 circumstances.

17 I don't see this as evidence shopping, and that's why
18 if I were going to allow the deposition, I wouldn't be inclined
19 to do anything that would include opinions or what Mr. Harris
20 thinks about someone else's opinion or how they've used his
21 report. It would really just be limited to the factual
22 information related to the testing that then is used for the
23 report that's relied on by the testifying experts, and that's
24 really where I was looking on that.

25 **MS. KAGAN:** Your Honor, to address that specific

1 point --

2 **THE COURT:** Sure.

3 **MS. KAGAN:** -- the factual information is contained
4 in the report that was produced. The report isn't "I found
5 tremolite in this container and that's it." It outlines the
6 detailed methodology that was followed by Mr. Harris in
7 collecting the talc from the container and analyzing it and
8 identifying asbestos in the analysis and identifies the
9 methodology specifically and how it was applied.

10 I have already agreed -- although I do think that the
11 information is protected by Rule 26, I have agreed to produce
12 any of the underlying data that may exist at Lab/Cor for this
13 test. For example, if there were any imaging taken of the
14 actual asbestos fibers identified on the grid or any other
15 records or anything that were tests related to the testing I
16 have already agreed to produce, and I have asked Mr. Harris
17 repeatedly to send that to me. He told that I would have it
18 yesterday, and I don't have it yet; but I was very clear with
19 counsel that I'm not withholding anything. I just don't have
20 anything else to turn over. And as soon as I do, I'll review
21 it and make sure there's nothing in there that would be
22 privileged; and to the extent that it is privileged, I would
23 produce a log.

24 The facts and data of the Harris work will be turned
25 over and has been turned over, and a deposition would merely be

1 him reading his report and reciting what he did. And that's --
2 there's no extraordinary or exceptional circumstances that
3 exist here that AII is unable to obtain that factual
4 information from any other source but a deposition, and they
5 will literally have all of that factual information.

6 **THE COURT:** All right. Anything else as to any of
7 those things with respect to 161 and 190? I interrupted you to
8 ask you that, so let me go ahead and let you finish.

9 **MS. KAGAN:** Sure. That was my argument with respect
10 to Mr. Harris and Lab/Cor and the Lab/Cor subpoena.

11 And we have already -- in our meet-and-confer, as is
12 clear in our joint status report, we have already agreed that
13 we would supplement the discovery request with information on
14 anything that was produced subsequent to us answering that
15 discovery request. That's not an issue.

16 Which then brings me to Mr. Fitzgerald with respect
17 to the videos and then the limit on his deposition. With
18 respect to the videos first, I have requested, pursuant to the
19 deposition notice and subpoena duces tecum to Mr. Fitzgerald,
20 for Mr. Fitzgerald to provide me with his entire file on the
21 Bell case. I asked for absolutely everything, which would
22 include data, and I didn't specifically outline every type of
23 document. I said everything.

24 And his assistant sent me a very, very large Dropbox
25 link of everything that he has on the Bell file and -- or that

1 what was represented to me -- everything on the Bell file and
2 all of the reliance materials. And the link was so large that
3 as opposed to downloading it and resaving it into the types of
4 links we send and produce in expert materials, I just sent the
5 Defendants the actual Dropbox link directly from Mr. Fitzgerald
6 and gave them direct access to it. I was not aware that there
7 were videos that were not disclosed, because, again, I asked my
8 experts to give me everything.

9 During the course of the deposition of
10 Mr. Fitzgerald, Mr. Fitzgerald also initially was not aware
11 that he hadn't turned over the videos; and when he realized he
12 hadn't, on a lunch break, he had his assistant find the videos
13 and upload them to a link. On that lunch break, I sent all
14 counsel that link to the videos. There were two videos.
15 Mr. Fitzgerald represented that is all that he had.

16 I confirmed again with Mr. Fitzgerald before our
17 meet-and-confer with counsel in this case and before today's
18 hearing that these are the only videos that exist at FAI
19 regarding these talc Clubman simulations. There is nothing
20 else I can produce, according to my experts.

21 **THE COURT:** The issue with that, Ms. Kagan, more than
22 anything for me is it looks like the defense counsel was
23 sending sort of notes or letters or emails letting you know
24 that along the way, but they still didn't have the videos and
25 they still didn't have the videos and that that could have been

1 investigated and resolved prior to the deposition.

2 I understand the initial sort of failure where it was
3 a general request; you thought he turned over everything, but
4 what I want to make sure is you all are still communicating
5 well enough with each other so that if counsel comes and tells
6 you, we still don't have the videos, that you can investigate
7 that and find that out before it gets to the point of being in
8 the deposition.

9 What Mr. Thackston has suggested and what seems
10 reasonable to me is they can explore that further with
11 Mr. Fitzgerald, if they need to, at his deposition, and then
12 you could do a specific answer to the interrogatories with
13 respect to the videos just to make sure it explicitly lists all
14 of the videos that exist so that there's not any confusion or
15 misunderstanding about that in the future.

16 Is that something that you would be able to do?

17 **MS. KAGAN:** Yes. We had already agreed to do that on
18 the meet-and-confer, that we would supplement the discovery
19 response to identify specifically what was produced during the
20 deposition of the videos and confirm that that is, according to
21 Mr. Fitzgerald, the universe of the videos that exist.

22 **THE COURT:** And I think it would be helpful as to
23 Mr. Fitzgerald. And then to the extent there is any other
24 videos of any testing for any of the experts, that you include
25 those as well so that we know that it's covered and taken care

1 of as to all of the experts so that issue doesn't arise again.
2 So I think it would include answering the interrogatory, with
3 respect to videos, to be specific about any videos and making
4 sure that all of those from Mr. Fitzgerald and from any other
5 experts who did testing have been provided, and then that would
6 take care of Mr. Fitzgerald's issue.

7 Other than this issue with respect to the length of
8 time, it looks like you all have stipulated and agreed in the
9 26(f) report, which was adopted as part of the scheduling
10 order, that there would not be any time limits on expert
11 depositions.

12 **MS. KAGAN:** I actually disagree with that
13 interpretation, Your Honor. It's not that there would be no
14 time limits; it's that the strict time limits of Rule 26 and
15 Rule 30 would not necessarily apply. It's not that there would
16 be an unlimited amount of time.

17 And, specifically, Rule 30(d)(3) allows a party to
18 terminate a deposition if the deposition is being taken in bad
19 faith or the conduct becomes harassing, and that's exactly what
20 happened with Mr. Fitzgerald's deposition. We are six hours
21 and 15 minutes into this deposition. A very large portion of
22 that deposition involved reading back Mr. Fitzgerald's prior
23 testimony to Mr. Fitzgerald from other cases.

24 Other Defendants have yet to question Mr. Fitzgerald.
25 I don't know if they have questions. I know that counsel for

1 Whittaker Clark & Daniels said he had about 15 minutes of
2 questions, but there could be other counsel that has questions.
3 I believe counsel for Colgate had questions, and they still
4 haven't had an opportunity to ask anything.

5 This isn't an unknown witness who has never been
6 deposed by Mr. Thackston.

7 **THE COURT:** Okay. So, Ms. Kagan, let me interrupt
8 you because -- let me go back to the 26(f) report. There may
9 be other issues with respect to depositions that would be
10 raised or potentially need to be addressed, but let's start
11 specifically with the 26(f) report that says: "The time
12 limitation contained in Rule 30(d)(1) of the Federal Rules of
13 Civil Procedure will not apply to depositions of expert
14 witnesses and any deposition noticed or taken as a de bene esse
15 at a for-trial deposition." That is Document No. 74 and
16 paragraph 2(D)(3). And, specifically, the reference is to Rule
17 30(d)(1), that the time limit there is a deposition is limited
18 to one day of seven hours, and that's specifically the
19 reference that it would not apply to depositions of expert
20 witnesses.

21 Those are routinely included in expert -- or in Rule
22 26(f) reports in some of these cases, and I am willing to adopt
23 those by agreement. I don't usually include an unlimited time
24 for deposition unless the parties have stipulated and agreed to
25 that, but that was what was in the 26(f) report, and that was

1 what was adopted as the order of the Court.

2 If there is good cause to revisit that or to adopt
3 some other limitation and provision going forward, then you can
4 make that request; but I can't see any way to interpret this
5 26(f) report other than exactly what it says, which is the time
6 limitation in Rule 30(d)(1) will not apply to deposition of
7 expert witnesses.

8 Is there something else as far as the history of that
9 provision in the 26(f) report that may shed some other light on
10 that, or anything else that you want to be heard on with
11 respect to good cause on changing that?

12 **MS. KAGAN:** Yes, Your Honor, both actually, too.

13 **THE COURT:** Okay.

14 **MS. KAGAN:** Again, stating that the limitations of
15 Rule 30 would not apply does not mean an unlimited deposition,
16 and it was very clear about halfway through this deposition
17 that this was not a deposition that was being conducted under
18 Rule 30 in good faith. So I believe there is cause to now
19 amend that stipulation and replace it with the traditional Rule
20 30 time limits in light of the conduct; hence, my objections
21 under Rule 30(d)(3) and my admonitions to terminate the
22 deposition if the conduct continued in the way that it was
23 continuing.

24 **THE COURT:** All right. So I did not see anything
25 that would warrant that from the parts that I saw that was

1 submitted to me. And, certainly, that's different now than
2 what the request was, since the request was a limit to the
3 seven hours in 30(d)(1) that wouldn't apply.

4 I will also just, again, note for all of you Local
5 Rule 30.1 with respect to the limits on making any objections
6 or statements, suggesting any answers for either side or for
7 anyone in terms of how the depositions should be conducted
8 under the local rules. So I'm not going to find any bad faith
9 or any issue there.

10 To the extent that the seven hours was by agreement
11 or stipulation in the 26(f) report waived, I will hear from
12 everybody with respect to whether you all need to request or
13 add some sort of time limit on those things; and I will just
14 take it as Plaintiffs' request now going forward to limit all
15 of the depositions to seven hours and whether I should change
16 the 26(f) scheduling order for that. I can hear from everyone
17 as we go through this.

18 So as to that, at least right now, it looks like the
19 26(f) report would waive the time limits for expert
20 depositions, but it may be worthwhile to consider whether there
21 is good cause to change that to put some sort of parameters on
22 that. And so I'll hear from everybody on that.

23 With respect to any of the other matters raised as to
24 161 and 190, including that request, anything else you want to
25 be heard as to any of that, Ms. Kagan?

1 **MS. KAGAN:** No, Your Honor, thank you.

2 **MR WATHEN:** Your Honor, excuse me, this is Frank
3 Wathen, also for the Plaintiff. Just a point of clarification,
4 with regard to supplementing the discovery regarding the
5 videos --

6 **THE COURT:** Right.

7 **MR WATHEN:** -- we are, of course, fine with that, and
8 I would just say that with regard to AII's motion to compel and
9 the conference we had, it's my understanding they just
10 reference requests for productions. I'm not aware of any
11 interrogatories that have been discussed in that context other
12 than here this morning.

13 **THE COURT:** So I think what that may be is just a way
14 to address the concern that there may be videos out there that
15 weren't produced, and so it may be an alternative remedy that
16 we're considering here that you all would provide, whether it's
17 as an answer to an interrogatory or some other affidavit or
18 statement that would specifically list all of the videos for
19 all of the testing that Plaintiff has done with any of their
20 experts just to make sure that there is finite list and that
21 all of that has been provided and accounted for.

22 Is that something you could do, Mr. Wathen?

23 **MR WATHEN:** Yes, Your Honor, I believe we can. I
24 just wanted to clarify that point.

25 **THE COURT:** All right. So I won't treat it as

1 anything other than an alternative or a remedy that we're
2 considering here just to confirm that there aren't any other
3 issues remaining as to that prior dispute.

4 All right. Before I go back to Mr. Thackston on
5 Nos. 161 and 190, let me hear from the other Defendants,
6 whether they have anything as to any of the matters that have
7 been raised. And then there's now a request from the Plaintiff
8 to modify the provision of the 26(f) report that waived the
9 time limits of 30(d)(1), and so I will hear from everybody on
10 that as well.

11 Mr. Chesson or Mr. Schroll, let me start with you all
12 from Colgate.

13 **MR. SCHROLL:** Good afternoon, Your Honor. This is
14 Matthew Schroll on behalf of Colgate.

15 At this point I think it's premature, and we would
16 oppose a blanket modification of the current order in the case
17 on that limitation.

18 And, you know, I -- specifically, as to
19 Mr. Fitzgerald, Colgate has deposed him before, and I don't
20 have much to ask him; but I don't want to be prejudiced by
21 being put in a position where I have two minutes of a
22 seven-hour time limit to depose him.

23 And I will say that, as for other experts, there are
24 other experts in this case who have been deposed, and there are
25 other experts in this case who are very new, and so we've -- I

1 don't think a blanket time limit is appropriate.

2 **THE COURT:** All right. So it may be something
3 that -- right now it's unlimited, and that may create its own
4 issues or problems. So it may be worth you all, before you get
5 too deeply into the other depositions, determining whether you
6 can reach an agreement; but absent agreement at this point, the
7 default is no limit. It may be, again, worthwhile for you all
8 to discuss that, whether on an expert-by-expert basis or some
9 sort of overall management of that, but it may be premature to
10 try to add that now. As you say, it's a blanket, since some of
11 the experts may differ from others in that.

12 Is that an accurate summary there, Mr. Schroll?

13 **MR. SCHROLL:** Yes, Your Honor. I would suggest that
14 if there is a request for a limitation, that it be taken on a
15 deposition-by-deposition basis and be supportive of due cause.

16 **THE COURT:** Okay. Mr. Peck for Cyprus?

17 **MR. PECK:** Yes, Your Honor. I agree with the
18 comments just expressed by Mr. Schroll. There has been no
19 demonstration of good cause shown literally in the depositions.
20 That's first, obviously. There's been no concern about that
21 amendment or revision to the Rule 26(f) report from the time it
22 was entered, and no demonstration that it's been abused at this
23 point; no showing of good cause that it's been a problem. So I
24 would also oppose changing that at this point.

25 **THE COURT:** All right. Mr. Tomlin, for Whittaker

1 Clark & Daniels?

2 **MR. TOMLIN:** Yes, Your Honor, I don't have anything
3 to add other than to say that I can expect that we can work
4 this out going forward, if necessary. At this point I don't
5 see any need to make any changes.

6 **THE COURT:** All right. That's good. Thank you.
7 And, Mr. Carruthers, anything you want to add for
8 Neslemur?

9 **MR. CARRUTHERS:** No, ma'am. We're just here to
10 listen, and we take no position.

11 **THE COURT:** Okay.

12 All right. Mr. Thackston, let me come back to you
13 with respect to anything as to 161 and 190 and this additional
14 suggestion for modifying the 26(f) report.

15 **MR. THACKSTON:** Well, Your Honor, I certainly
16 disagree with modifying the report.

17 What happened in this case is I deposed
18 Mr. Fitzgerald -- I tried to depose him one time in a Clubman
19 talc case, and the deposition was terminated because he refused
20 to answer questions. But in that one deposition, he said,
21 "I've tested Clubman talc three times. I never found any
22 asbestos," right. So I need that testimony in this case. And
23 it took a while to get it because he did not want to say under
24 oath in this case what he said under oath in another case, that
25 he doesn't disclose those negative reports in his report in

1 this case. He tests a 30-year-old can. And I said, Yeah, but
2 you've tested three plastic containers that didn't have any
3 asbestos in them; right? And to get a straight answer to that
4 took a long time.

5 And we also had the situation of -- when you have a
6 time limit, then if defending counsel is allowed to constantly
7 interrupt and make speaking objections and the witness is in
8 the -- I don't know if you remember the four corners, but is in
9 the stall mode where every question he tells you he has to go
10 check something, you know, they can literally run out the clock
11 without answering questions. So I think a time limit
12 encourages the filibustering that we were getting in this
13 deposition. So I don't think we need that.

14 And then with respect to the John Harris deposition,
15 his report is two pages, and it's extremely conclusory. It
16 says -- for example, on the second page, his says -- it talks
17 about general concepts of ways that you can do something. It
18 says:

19 "Confirmation of the crystalline nature of each fiber
20 was accomplished using dual tilt diffraction analysis. This
21 type of analysis was needed to assure that the crystalline
22 structure of the fiber can be confirmed using either rotating
23 tilt and/or double tilt specimen holders. The fiber is tilted
24 to specific positions in relation to the electron beam
25 order" -- I think that means in order -- "to confirm

1 crystallographic planes. In such a position, crystallographic
2 information is obtained to confirm the mineral species from
3 other similar mineral species. Lab/Cor uses a software program
4 that uses both the data obtained from the crystallographic
5 observations and then compares also the chemical composition of
6 the particle from energy dispersive spectroscopy values to
7 further refine the final definitive mineralized confirmation,"
8 period.

9 Okay. But what did you do? Did you tilt it? At
10 what angles did you tilt? How many times? He doesn't even
11 name the program that they used to reach these conclusions. So
12 he uses a real general statement about what you can do, and
13 then he gives you his conclusion, and there is an enormous gap
14 in between about what he actually he did, how much of it
15 involved subjective interpretation.

16 And he did actually find at a different time -- I
17 think Plaintiffs' counsel said they all found amphiboles, and
18 that's just a -- that's just a giant category of materials, and
19 he found anthophyllite and lost the fiber. We actually need to
20 talk to him about what kind of standard operating procedures he
21 has and how often it is for him to lose the fiber after he
22 finds it. So I definitely disagree that the questions are
23 answered here.

24 And our subpoena was detailed in specifying exactly
25 the kinds of materials that we would need that should underlie

1 a report like this, and the Plaintiffs' objection for that were
2 stuff like -- were the most form objections imaginable.
3 Everything was vague and uncertain and not proportional to the
4 burden, though I think that the subpoena should be the guide
5 for what it is that they should supply in this case. It's the
6 kind of data that are supposed to underline -- underlie
7 conclusions like this, the kind of data that other people like
8 their expert Compton would produce for his report.

9 And, finally, Your Honor, on the testing thing, I've
10 done a poor job, I guess, of explaining what's different
11 between the bulk analysis and a can demonstration or simulation
12 inside of a glovebox.

13 Nobody -- I don't think anybody is alleging that they
14 put the powder back into the bottle when they were done, right.
15 It's a twist top shaker, and there are some paragraphs in some
16 of the materials that we produced. Once you get it out, at
17 least Plaintiffs' experts have said, you can't put it in back
18 in.

19 And so whatever Fitzgerald tested was different than
20 what Hairston tested was different than what Compton tested
21 because the can had been used in a simulation, they say, where
22 they shook some out of the can and did various things with it.
23 How much they shook out of the can we're still trying to figure
24 out. So I think we need full leeway to explore those alleged
25 simulations tests that took place inside the box.

1 And if I can just say one final thing on the videos,
2 on the discovery response? If videos have been destroyed or
3 lost or otherwise become unavailable, I think they need to
4 explain that because -- and I'll explore that with
5 Mr. Fitzgerald, but his report says they exist.

6 An awful lot of time was spent in his deposition --
7 you know, a picture is worth a thousand words. If I had the
8 videotapes before his deposition, I wouldn't have to had go
9 step by step by step to ask, What did you do? And he didn't
10 even remember -- he claimed to not even remember whether he had
11 the can inside the box to do his testing or whether he had
12 poured some out and just put that amount inside the box to do
13 the testing. It look a lot of time to try to develop that when
14 if I just had the videos in advance, we could have started way
15 further on.

16 Thank you.

17 **THE COURT:** All right. If I were going to allow a
18 limited deposition of Mr. Harris, as I've indicated, by subject
19 matter but also adding a time limit there consistent with that,
20 which I noted in the range of two or three hours, any issue
21 with respect to that sort of limit, given the limited nature of
22 the inquiry that we're talking about here?

23 **MR. THACKSTON:** Your Honor, just -- assuming
24 cooperation of the witness and not interruptions by the other
25 side, I could take that deposition in three hours, I believe.

1 I would ask -- Your Honor, I would be happy for the
2 Court to review that Fitzgerald testimony and sanction one or
3 the other. If the Court thinks that I was out of line,
4 sanction me. If the Court thinks opposing counsel was out
5 of line, sanction her. But that's how strongly I feel about --
6 it was conducted properly from my end, and I would ask the
7 Court -- I would be happy for the Court to appoint a discovery
8 master or the Court herself preside over these depositions
9 because I think they would be a lot more efficient if somebody
10 else were present to rule on things like that.

11 **THE COURT:** Well, I indicated I am not going to
12 impose sanctions. I didn't see a basis for sanctions. I have
13 given you my general reference for everyone to the local rules
14 and also my indication that the next round of remedy that I
15 would find is to require local counsel to be there and then to
16 be responsible for any discovery motions filed in relation to
17 anything that may be raised or occur, and that's generally what
18 would be the next round of remedy, although it's very rare that
19 folks can't get along well enough that we have to resort to
20 that.

21 So I understand -- I'm just going to put it back to
22 you all to try to conduct these depositions consistent with the
23 federal rules and the local rules; and if you need to, go ahead
24 and have local counsel responsible for being present, because
25 that's the next round of what I would do before we start

1 talking about appointing a special master.

2 We have lots of asbestos cases in this district, and
3 they are able to make it through discovery without that sort of
4 issue or remedy, and so I'm going to let you all try to do a
5 reset here and see if you can do that in this case.

6 If we have to come back for more hearings, we'll
7 determine whether we can do that still by telephone or whether
8 we at least have local counsel here and do those in person so
9 that we can sort out what may be going wrong here; but at this
10 point, I'm going to express my hope that you all can do the
11 reset yourself and make it through the rest of these
12 depositions here.

13 **MR. THACKSTON:** Well, Your Honor, I am local counsel,
14 so I'm all for that rule.

15 **THE COURT:** All right. Well, that is my general
16 remedy here. I'll just make sure then you're not -- you're not
17 pro hac? You're local counsel as well; is that right,
18 Mr. Thackston?

19 **MR. THACKSTON:** Yes, Your Honor, I'm licensed in
20 North Carolina. From Winston-Salem and licensed in North
21 Carolina.

22 **THE COURT:** All right. So that -- again, that is
23 generally my first round of remedy, but I will, again, leave it
24 with you all with the hope that you can do a reset here. If we
25 need to all come in and talk about it together, we can do that;

1 but let's see if we can move forward.

2 I'm not going to preside at your depositions, and I'm
3 not going to appoint a special master; but we can have some
4 more hearings here, if we need to do that, but it is not
5 ordinary that that's necessary. So I hope you all will be able
6 to address that or work that out with the rest of these
7 depositions.

8 **MS. KAGAN:** Your Honor, if I may be heard briefly --
9 this is Ms. Kagan -- on that topic?

10 **THE COURT:** Okay.

11 **MS. KAGAN:** I agree with you, Your Honor; this is not
12 ordinary. It's extraordinary, but it's not extraordinary when
13 it comes to counsel for AII. And in California and in New
14 Jersey, when I've had to deal with Mr. Thackston specifically
15 in depositions of our experts, they have, more often than not,
16 resulted in suspensions of depositions and courts limiting
17 Mr. Thackston's ability to continue with harassing our experts.

18 And so the idea that this could be remedied by having
19 local counsel participating, unfortunately, I don't think it's
20 a solution because, as Mr. Thackston indicated, he is his own
21 local counsel here. And without any limits set to these
22 depositions and the patterns of behavior that Mr. Thackston
23 engages -- either -- maybe I'm special. Maybe it's just with
24 me. I don't know, but the other folks who have deposed our
25 experts, this doesn't happen.

1 So I envision this is not going to just be a reset,
2 and I think it is going to be an ongoing problem. And I would
3 hate to continue to have to file motions. I would hate to have
4 to terminate depositions and file motions to limit them or
5 whatnot. And so if the solution is really to have a discovery
6 referee to appear at these depositions with us, I would welcome
7 that because I would hope then that we would be able to
8 efficiently get through these depositions without personal
9 attacks and without repetitive harassment and argument and
10 questions of the witnesses that is endemic to these AII cases
11 regardless of what jurisdiction we are in.

12 **THE COURT:** Well, Ms. Kagan, I have to tell, though,
13 the clips or the pieces of the depositions I saw, I had as much
14 concern about your piece as any; and so I'm going to, again,
15 direct you to the local rules and ask everybody to do a reset
16 in terms of how these depositions are conducted.

17 I am not going to preside over your depositions, but
18 we'll start getting into the position of precluding experts if
19 there's behavior that you all can't address or correct on your
20 own with respect to these expert depositions.

21 **MR. THACKSTON:** Your Honor, I mean, speaking of
22 personal attacks, that was a personal attack that I find
23 offensive and very untrue and we have avoided this. You have a
24 motion before you where you have a statement on the record from
25 Plaintiffs' counsel inviting us to issue a subpoena and then a

1 motion for sanctions for issuing a subpoena with all kinds of
2 personal attacks.

3 It's a litigation tactic to distract the Court from
4 the merits of the case, which probably indicate the weakness of
5 the merits of the case when you're constantly going after by
6 name their lawyer. And they aren't examples of this ongoing
7 feud. There's no ongoing feud. This is just a tactic to make
8 the Court think there is an ongoing feud so that the Court will
9 say everybody play nicely, and I'm not going to look at the
10 merits of the motion as being broad.

11 So I appreciate the Court not taking that invitation,
12 but I disagree, and I'm not engaging in those tactics. I'm not
13 calling anybody out by name or saying -- other than looking at
14 specific examples in depositions that occurred in this case.

15 **THE COURT:** So, Mr. Thackston, I understand you
16 wanting to respond, but responding that way actually does not
17 help because we're still back at you all at each other, rather
18 than helping me resolve the particular disputes that we've got.

19 I already indicated I'm not going to impose
20 sanctions, or I have not found any bad faith; and I want to go
21 forward with resolving the disputes. So I am, again, going to
22 say to both of you to reset and try to move forward with
23 discovery. I don't find either one of you to be blameless in
24 this, to the extent I have bits and pieces before me, and it
25 certainly continues to be represented in the discussion that

1 we're having here. So that's the problem that I'm talking
2 about. That's what I want you both to reset.

3 I would like to go forward now with respect to the
4 rest of the dispute that we have. On that, we've got first
5 this No. 161 and No. 190. What I'm going to do on that is as
6 to the motion to quash, No. 161, I'm going to find that motion
7 is denied as moot because the parties have agreed to address
8 that as part of party discovery.

9 As to the motion to compel, No. 190, that motion is
10 going to be granted in part in that Plaintiff must provide the
11 documents as agreed. I don't have a specific time frame on
12 that given the extenuating circumstances on the West Coast. I
13 understand that, but I'm going to go ahead and say a week; and
14 if there is a need to extend that further, then I expect
15 Plaintiff to file a motion explaining what they've done and
16 what remains to be done in order for that to be provided.

17 In addition, Plaintiff will provide, either as an
18 answer to an interrogatory or a further affidavit, a statement
19 with regard to all videos that have been or were created of any
20 of the testing, listing any that exist or that have existed for
21 each of their experts, to make sure that we have a finite list
22 on those.

23 With respect to Mr. Harris, I'll require Plaintiff to
24 make Mr. Harris available for a deposition, in which the
25 Defendants are limited to three hours, limited to Mr. Harris'

1 testing and report, but not any other opinions, whether his own
2 or his view of others' opinions. Particularly, I'm not finding
3 that this was any type of expert shopping or any basis to
4 explore further what his opinions may have been other than just
5 specifically what's set out in his report and, more
6 particularly, the facts that underlie his testing and the
7 information in the report.

8 That would be based on the Court's finding that even
9 though he was not designated as a testifying witness, multiple
10 of the other testifying experts cite his testing as support,
11 and in this limited way, there are exceptional circumstances in
12 which it was impractical for AII to obtain facts on the same
13 subject matter by other means. Again, though, that would be
14 limited just to the testing, including, for example, chain of
15 custody, contamination preventions, sample creation conditions,
16 and factual information regarding the testing.

17 As to the reconvened deposition of Dr. Fitzgerald,
18 that would not otherwise be limited in light of the stipulation
19 and agreement in the 26(f) report that the time limits of
20 30(d)(1) are waived for experts and de bene esse depositions.
21 And the parties will agree to at least discuss or meet and
22 confer regarding whether it may be appropriate to add any
23 limits on a deposition-by-deposition basis, but, for now, those
24 provisions of the 26(f) report have waived the time limits that
25 would otherwise apply.

1 With respect to those, there was also a motion,
2 No. 194, to add this issue to the hearing today. To the extent
3 that's not already been done, that should be shown as granted
4 since we have addressed and covered that.

5 Finally, I would, again, just note generally that
6 there's been some breakdown in communication, and I would
7 encourage both counsel for Plaintiff and counsel for AII to
8 reset that for future depositions so that this can proceed with
9 respect to the remaining expert depositions in order to keep
10 the case on for trial and all the experts in the case.

11 I can consider whether to require local counsel to
12 participate and/or other suggestions, but I'm not going to do
13 anything further on that at this time other than just give my
14 general direction for complying with not only the federal rules
15 but the local rules and the general exhortations to cooperate
16 in discovery and particularly in depositions here.

17 I think that covers everything as to 161 and 190 as
18 well as that 194.

19 And then there was also a motion to quash, 151, that
20 the parties agree is moot. And so I'll ask the clerk to note
21 151 is denied as moot by agreement of the parties.

22 That then takes us to 168 and 179, which is the
23 motion to quash as to Northwell and the motion for protective
24 order as to Dr. Moline and the related motions to seal. As to
25 both of those -- those are Plaintiffs' motions -- I have given

1 you some general indication of my thoughts on that with respect
2 to where we might be as well as the motions to seal and how
3 that would apply to the discovery stage.

4 Ms. Kagan, let me hear from you first. These are
5 Plaintiffs' motions, so I will let you address those, in light
6 of the Court's earlier discussion.

7 **MS. KAGAN:** Thank you, Your Honor. And I took some
8 notes on what Your Honor indicated were (inaudible) are with
9 respect to these motions, and so I am going to follow that
10 guidance and address the concerns I have that Your Honor
11 raised.

12 **THE COURT:** Okay.

13 **MS. KAGAN:** So the first concern that I have is the
14 manner in which the information was obtained. [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED] Dr. Moline has never
18 disclosed the identities of the 33 patients in her paper; [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED] None of the
24 33 patients consented to being part of this study.

25 That is why specifically they are anonymized, and

1 that is, I think, the heart of the issue, that human research
2 is fraught with potential privacy and confidentiality and
3 ethical challenges. And as Dr. Moline and Dr. Diette and
4 Dr. Roggli all explained, and we put that in our papers, when
5 you do human research and you publish on it, it has to remain
6 anonymous.

7 And that's actually consistent with the guidelines
8 from the Department of Health and Human Services and the FDA,
9 45 CFR 46.111(a)(7) and 21CFR56.111(a)(7). There are
10 institutional review boards that are required to assess whether
11 or not a human subject in a published study can be revealed,
12 and that is done, again, to protect those human subjects and to
13 protect the integrity of the research.

14 And Dr. Diette expressed -- and, again, Dr. Diette is
15 a pulmonologist at Johns Hopkins. He is an expert that
16 defendants in asbestos talc litigation routinely retain, and I
17 deposed him this year on behalf of Johnson & Johnson, and he
18 was very clear about the ethical requirements that somebody
19 would have to go through before revealing the identity of a
20 human patient, and he said that they would have to approach an
21 ethics board. If there was approval from the ethics board,
22 there would have to be an informed consent process.

23 And what I thought was really interesting -- and this
24 is Exhibit G to our papers -- is that Dr. Diette testified that
25 the informed consent process is, quote, not just signing a

1 consent form, but with a real consent process, [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 So because of that, I find that it would be
13 absolutely inappropriate and contrary to the well-established
14 case law and the statute to de-anonymize [REDACTED]

15 [REDACTED]

16 **THE COURT:** So, Ms. Kagan, here is the issue here,
17 though. [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 MS. KAGAN: If I may respond to that, Your Honor?

7 THE COURT: Sure.

8 MS. KAGAN: [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED] [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

17 [REDACTED] it would reveal the
18 confidential information of patients that are part of the human
19 study without an ethics board approval and without informed
20 consent. So we couldn't provide that discovery, and it was
21 obtained -- and the information was obtained in an improper
22 fashion.

23 But the litigation issue I think is really important
24 because Dr. Roggli, who is now a late-disclosed expert by
25 AII -- Dr. Roggli has published on hundreds of his patients

1 that he has seen wholly in litigation, and he's published human
2 studies, offered conclusions, including about whether or not
3 talc causes mesothelioma and asbestos in talc causes
4 mesothelioma. And they designated him as an expert, and he has
5 published on human studies for decades. And Dr. Roggli has
6 taken a very strong stance that it doesn't matter if you're
7 testifying on behalf of any of those patients or against any of
8 those patients in litigation; the confidentiality of their
9 identities is paramount.

10 It's also a First Amendment freedom of speech and
11 research issue, that these types of things, the confidentiality
12 of human patients and subjects, if they had to be revealed in
13 every study, there would be no study, unless people volunteered
14 publicly to do this.

15 And the data that is collected in litigation,
16 specifically asbestos litigation, is very precious, for lack of
17 better words, because mesothelioma is such a rare disease, and
18 there isn't a cure. And so there aren't a lot of studies on
19 human patients with mesothelioma and the various exposures and
20 the various potential causes.

21 Disclosing human patient means, [REDACTED]
22 [REDACTED] -- would quash that
23 scientific effort completely.

24 And another part to that, also, Your Honor, is the
25 Defendants rely on epidemiology studies, human studies that are

1 on the Italian miners and millers and the Vermont miners and
2 millers. And the information in those studies that those
3 authors published -- and the Vermont study was published by
4 some of the defense experts -- are based on employment records
5 and medical records that these individuals provided to their
6 employers. They didn't consent to being part of a published
7 studies. Their names are anonymized.

8 Allowing this would open the floodgates to all of
9 these various researchers who rely on workers' compensation
10 records, like the Finkelstein publications about the Archie
11 Vanderbilt line, or medical worker records, like the Italian
12 and Vermont, or Dr. Roggli's publication on human tissue
13 analysis and Dr. Abraham's studies on human tissue analysis --
14 all to be disclosed because they obtained those records either
15 through litigation or through employment records.

16 **THE COURT:** Well, again, Ms. Kagan, I think you're
17 talking about something different, though, because I understand
18 the concern if you're saying, well, because they were related
19 to litigation, they are all free and open. Obviously, that
20 creates some significant concern, [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 It seems to me fundamentally different there. [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 It creates a potential to mislead the fact finder
9 that I think we would need to consider and address here, [REDACTED]

10 [REDACTED] [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED].

16 MS. KAGAN: Your Honor, I respectfully disagree.
17 She, from just memory, does not know the names of all 33 human
18 subjects that she selected for this publication. [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED] [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 And, again, I think the issue is ultimately the

1 candor to the jury and the ability for AII to cross-examine
2 Dr. Moline on these issues, and AII has had that opportunity.
3 They have, in fact -- Mr. Thackston did, in fact, cross-examine
4 Dr. Moline at length earlier this year in New Jersey in a
5 different trial of two consolidated Clubman cases, and that
6 judge did not allow him to identify [REDACTED]

7 [REDACTED]

8 **THE COURT:** [REDACTED] [REDACTED]

9 [REDACTED] [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 **MS. KAGAN:** [REDACTED]

16 [REDACTED] because somehow AII has
17 been deprived of the ability to meaningfully cross-examine, and
18 that's just not true. They have been able to meaningfully
19 cross-examine things like did Dr. Moline take into account that
20 somebody filed a workers' compensation. That's an easy
21 cross-examination point [REDACTED]

22 [REDACTED]

23 [REDACTED] Mr. Thackston can
24 cross-examine Dr. Moline specifically: Did you take into
25 account this specific fact, the idea that hairdryers, some

1 hairdryers at some point in time, contained asbestos? That is
2 a question that is easily asked of Dr. Moline on
3 cross-examination without identifying any of the individuals
4 that are described as hairdressers. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED] good cause

8 hasn't been shown by AII that they would be deprived of the
9 ability to cross-examine Dr. Moline [REDACTED]

10 [REDACTED] especially if the goal of the cross-examination is
11 to undermine Dr. Moline's opinion or paper conclusion that
12 these individuals had no concern of asbestos exposure other
13 than the talc.

14 Well, that's an easy question to ask Dr. Moline: Did
15 you confirm whether or not any of these people filed workers'
16 compensation claims? Did you confirm with the hairdressers
17 whether or not they used hairdryers? Mr. Thackston did an
18 excellent cross-examination exactly like that in the *Lashley*
19 and *Johnson* cases in New Jersey, [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 THE COURT: [REDACTED]

25 [REDACTED]

1 [REDACTED]
2 Let me ask you one other thing, though, with respect
3 to the remainder of the subpoena to Northwell. Is that still
4 outstanding as an issue, or where are we with that?

5 **MS. KAGAN:** It is, Your Honor, with respect to -- as
6 we identified in our motion to quash, these are not the types
7 of information that the custodian of records of Northwell would
8 be providing. These are specific information about Dr. Moline,
9 so her employment contract with Northwell, her salary, any
10 correspondence she had with her coauthors on this paper. These
11 are the types of things that Rule 26 discovery is for and not a
12 subpoena to her employer's custodian of records. So our motion
13 to quash stands with respect to those objections.

14 **THE COURT:** All right. And then as to the motions to
15 seal, while I could consider those for discovery purposes, it
16 would be a separate First Amendment standard you would have to
17 meet with respect to dispositive motions and trial.

18 Anything else you wanted to address as to the motions
19 to seal?

20 **MS. KAGAN:** Yes, Your Honor, if I may? I understand
21 Your Honor's reasoning -- or position [REDACTED]

22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 [REDACTED]
2 So, for example, that *Johnson-Lashley* trial had to be
3 suspended, and it was ultimately mistried because of the
4 pandemic, and jurors could not remain sworn as jurors
5 indefinitely.

6 So at some point we will be able to come back and try
7 the *Johnson-Lashley* case in New Jersey, and Mr. Thackston
8 certainly, I'm confident, will attempt to use this information
9 in that trial, and that judge has already ruled that's not
10 appropriate, but there's nothing stopping him if the record
11 isn't sealed. If this hearing, this portion of our transcript
12 is not sealed for discovery purposes and the records and
13 filings are not sealed, then [REDACTED]

14 [REDACTED]
15 [REDACTED]

16 **THE COURT:** I think that's fair, and I would want to
17 make sure that we are keeping that [REDACTED]
18 confidential and under seal. And then to the extent it may
19 have to be revisited ultimately at trial, then that's something
20 that the district judge can consider further, to the extent
21 that needs to be done; but, certainly, at this point I would
22 not expect or intend these sort of preliminary or
23 discovery-related determinations -- to make that then public
24 for use in other cases.

25 Anything else, Ms. Kagan, before I go to

1 Mr. Thackston?

2 **MS. KAGAN:** No, thank you, Your Honor.

3 **THE COURT:** All right. Mr. Thackston?

4 **MR. THACKSTON:** Your Honor, I don't have much to say
5 on it other than that these are not protected materials by any
6 stretch of the imagination.

7 I asked Dr. Moline in her deposition -- I think it's
8 clear from the face of the article that I asked her in her
9 deposition: Everything you've got was from a lawsuit?
10 Everything produced to you was, like, answers to
11 interrogatories? And she says -- she says on page 12 of her
12 article: "Exposure histories were reviewed based on sworn
13 testimony by patients and, in some cases, family members with
14 firsthand knowledge."

15 So, I mean, we're talking about deposition
16 transcripts. I think if there is an actual medical record,
17 they can designate that record and then say there's something
18 about that that's confidential.

19 But here's the other problem, Your Honor. The fact
20 that this stuff is not HIPAA protected is evidenced by the fact
21 that Dr. Moline openly talked about it in glory detail in her
22 report. You've got -- you mentioned earlier Dr. Moline's
23 report. [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED]

2 [REDACTED] [REDACTED]

3 [REDACTED] And if this stuff was HIPAA protected, Dr. Moline
4 would probably be in a world of trouble. The fact is no one
5 has treated it as being HIPAA protected because it was
6 disclosed in the course of litigation.

7 So to claim now that because Dr. Moline happens to be
8 employed by Northwell -- I guess they let her use her work
9 server to do litigation articles. Actually, they -- one of the
10 reasons for the employment agreement is that Northwell gets
11 paid when she does it on their clock. She gets paid when she
12 does it at home.

13 But the burden to show that something should be
14 sealed -- I haven't seen any case or authority for the idea
15 that if it could be used against you in another case, if it
16 could be used against that witness in another case, then it
17 ought to be sealed. I mean --

18 **THE COURT:** Well, Mr. Thackston, I think we're
19 getting a little off track here. There's plenty of authority,
20 including in this court's own development of the local rules,
21 for the idea that we don't use the discovery process or the
22 court's docket to make things public that aren't otherwise
23 public records or information. It's a different thing if
24 something is a judicial record, which, particularly in the
25 context of dispositive motion or trial, means has First

1 Amendment protections; but documents produced in discovery are
2 not subject to common law disclosure or information, and
3 certainly where there's confidentiality orders or protections
4 in place and a party can claim something is confidential, then
5 we go through the process of sealing under 5.4 for information
6 that's filed on the docket.

7 Here, when it's related to discovery, we follow the
8 more general balancing that applies when the First Amendment
9 doesn't apply, and because we're at the discovery or the
10 preliminary stage, it makes sense to allow those things to be
11 filed for which confidentiality is still claimed.

12 And I do think there are concerns with regard to
13 disclosure of this outside this case. [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 So, as I said, I think the determination will
21 ultimately be up to the district judge when we get to trial in
22 this case, but at this point we're just talking about discovery
23 materials. There is no right to use discovery materials from
24 one case in another case, particularly where, here, there is
25 some claim of confidentiality that's only being produced

1 subject to that claim and subject to a confidentiality
2 protection in place.

3 So I would caution against a notion of using this or
4 being able to use this in some other case, because if that's
5 where we're headed, then I would be more inclined to put a
6 protective order over all of it and not allow it to be used at
7 all. If we're talking about using it here just in this case

8 [REDACTED]
9 [REDACTED]
10 [REDACTED] I think a limited disclosure and
11 use of that is not outside the bounds of reasonableness and
12 actually is necessary to avoid potential misleading of the fact
13 finder here.

14 So that's where I am, but I interrupted you because I
15 don't want end up too far down a path where you make me
16 second-guess that determination.

17 **MR. THACKSTON:** Your Honor, I don't have -- I'm not
18 trying to conduct discovery for any other case. [REDACTED]

19 [REDACTED]
20 But if the materials we're talking about are -- [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED] maybe we agree that
24 everything is treated confidential for 14 days, and if they
25 want that to continue to be confidential, then they have to

1 point out why it's confidential and not otherwise available in
2 the case.

3 But, obviously, not only we, but that stuff is
4 shareable and Dr. Moline can be cross-examined on her report in
5 this case and other cases. We certainly -- when they put
6 reports out there, they get put out there for general
7 consumption. At least in the litigation, they get -- they can
8 be sent to the defense expert reports -- defense experts for
9 their response to them.

10 So I'm just trying to think of what kind of
11 information could come from the Northwell files [REDACTED]
12 [REDACTED] and I guess if there is something
13 like that, certainly agree to treat it confidentially until at
14 least we could have a hearing on it.

15 **THE COURT:** So I may have lost, though, your train of
16 thought there. What now are you talking about, because it's
17 different than just the limited piece of information we're
18 talking about here, [REDACTED]?

19 **MR. THACKSTON:** Yeah, right. What Dr. Moline said
20 she relied upon was discovery materials in the case. She
21 didn't do the pathology part of this case. She says she relied
22 on discovery materials, like deposition transcripts. For us to
23 have to treat deposition transcripts [REDACTED]
24 [REDACTED], as
25 those are confidential information just seems not an

1 appropriate use of the rule for sealing materials.

2 **THE COURT:** So I think we're talking about different
3 things. The sealing is only for what's filed on the docket,
4 and it's only where there's been a claim of confidentiality.
5 Now, that can be pursuant to a stipulated protective order
6 that's been entered in the case and the parties agree to
7 designate things as confidential and file them under seal with
8 a motion to seal under Rule 5.4, or it can be a particular
9 piece of information that the party requests confidential
10 treatment or designation of; and then as to that, it's limited
11 however the Court may decide, if it's not already subject to a
12 confidentiality agreement in the case. So we may be talking
13 about different things here.

14 With respect to the motions to seal, those are
15 specifically just as to the documents filed on the docket, and
16 I would grant that.

17 With respect to the request for a protective order,
18 to the extent that may be a broader request, my inclination
19 would be to deny the request to the extent it requires
20 destruction of the material [REDACTED]

21 [REDACTED]
22 [REDACTED] and any future determination about whether it needs to be
23 made public as part of the trial or dispositive motion will be
24 for the district judge; but until then, it should be treated as
25 confidential under 5.4, which requires a motion to seal if

1 anybody is going to file it on the docket.

2 That's just as to that particular piece of
3 information. And I don't know that you all have had any
4 practice in this case of otherwise designating information as
5 confidential; but if it hasn't been designated as confidential
6 pursuant to a stipulated protective order or pursuant to an
7 order I've just entered here, [REDACTED]
8 [REDACTED] then there wouldn't be a reason why
9 it had to be sealed or with a motion to seal, unless it's
10 something that you're requesting to seal. Again, that's just
11 all covered by 5.4, and that's with respect to documents that
12 are filed.

13 So I'm a little bit confused, I think, Mr. Thackston,
14 about exactly what it is we're focused on now or what the issue
15 may be, just to make sure I'm understanding.

16 **MR. THACKSTON:** Well, Your Honor, I go back to the
17 idea that you can take litigation materials that the witness
18 says are available to defense counsel in the case. She admits
19 these are materials that the defense counsel have; I have been
20 cross-examined in these cases. And then apparently without --
21 if she did it without permission, and, apparently, she didn't
22 think permission was necessary, these definitely are not
23 subject -- human study subjects within the meaning of either --
24 any of the cases that the Plaintiff cited. They cited a case
25 involving a blood donor who had HIV, and they wouldn't disclose

1 who that was, wouldn't require the blood service to disclose
2 who that was or an actual medical study where there is a
3 physician-patient relationship.

4 The context of litigation makes it different, and the
5 witness obviously didn't think -- or Dr. Moline didn't think it
6 was necessary to get any kind of permission to share the
7 litigation information, but by putting it in an article, now
8 she can't be questioned about those cases unless she discloses
9 what they are.

10 **THE COURT:** Mr. Thackston, let me interrupt you again
11 because I'm still confused. [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 **MR. THACKSTON:** [REDACTED]

16 [REDACTED] [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED] [REDACTED]
21 [REDACTED] [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 [REDACTED].

2 **THE COURT:** Okay. So I think I understand,

3 Mr. Thackston. Your argument is now related to the [REDACTED]

4 [REDACTED] [REDACTED]

5 [REDACTED]

6 [REDACTED] [REDACTED]

7 [REDACTED] [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 And so I think, along the same lines as what happened
11 up in New Jersey [REDACTED]

12 [REDACTED] I would have the same sort of concerns if
13 you had to try to get the identification of the [REDACTED]
14 individuals here. There are important confidentiality and even
15 larger structural concerns with regard to how these
16 publications are presented and constructed and protected, and
17 so I don't see a basis for requiring disclosure, and I don't
18 see any case law that would support that as far as other
19 individuals who may have been included in the study.

20 [REDACTED]

21 [REDACTED]

22 [REDACTED] it's subject to a confidentiality claim and
23 protection to the extent that it's not disclosed outside of
24 this case, unless or until the district judge makes a
25 determination on that as part of dispositive motions or trial.

1 [REDACTED]
2 [REDACTED] everything would need to be redacted on that and a
3 motion to seal would be filed, as the Plaintiffs did consistent
4 with Local Rule 5.4. And if the Defendants were filing that
5 information, they would need to file the motion to seal.

6 I will say that just as a purely technical matter,
7 the Plaintiffs did that technically correct, and I would
8 commend them for that and ask you all to do the same thing,
9 which is specifically you file the full document as a sealed
10 document, all of the provisions, and then you file the redacted
11 document as a public document as a complete filing so that all
12 of the ECF numbers, for instance, match up, the attachment
13 numbers all match up, and they are essentially mirrors of each
14 other. There's just a redacted one and a sealed one.

15 The only piece I would add for Plaintiffs and for
16 Defendants going forward is if the sealed version can also
17 include highlighting over the parts that are sealed, then what
18 that lets the Court do is use the sealed version as the working
19 copy that I have or that the district judge will have, but then
20 the highlighting on it lets the Court know easily this part is
21 the part for which sealing is claimed; and so if it's going to
22 be used in an order or addressed as part of the substance, then
23 there's going to need to be a determination made with regard to
24 whether it should be filed under seal or not.

25 That is an aside, but it looks like there may be

1 issues where things get to be filed under seal in this case
2 and, if so, then follow Rule 5.4, but as a technical matter,
3 refile the whole document the way the Plaintiffs did and just
4 add the highlighting on the sealed parts. That's my aside on a
5 technical issue that will help the Court a lot, whether it's me
6 or the district judge who is handling it later.

7 Before I finalize or make my determination, anything
8 else, Ms. Kagan -- I was with you -- as to 168?

9 **MR. THACKSTON:** Your Honor -- I'm sorry, Your Honor.
10 Could I just offer one additional suggestion?

11 **THE COURT:** I will come back to you, Mr. Thackston,
12 but I was with Ms. Kagan. So let me finish with her.

13 **MR. THACKSTON:** I'm sorry.

14 **THE COURT:** Ms. Kagan?

15 **MS. KAGAN:** Yes, Your Honor. I think, again -- and I
16 think Your Honor actually said this in response to
17 Mr. Thackston, but there is no case law that says that the
18 context of litigation makes -- or destroys human study
19 confidentiality across the board, the identity of these ■
20 ■■■■■ individuals in this study. There aren't releases from
21 these patients for this information because they were never
22 approached to release this information. ■■■■■
23 ■■■■■, and there certainly was no informed
24 consent given by the ■■■■■ human subjects of this study,
25 identities which no one knows other than Dr. Moline; and so the

1 idea that HIPAAs can start being collected for medical records
2 and submitted to Northwell for release of these names is highly
3 inappropriate.

4 And the other piece of it -- and I just -- I
5 appreciate Your Honor's distinction and clarification that you
6 would grant the protective order -- or you're inclined to grant
7 the protective order in part, [REDACTED]
8 [REDACTED] and
9 that it cannot be used outside of this case for discovery
10 purposes, and a final determination obviously of that would be
11 made by the district judge, either by dispositive motion or at
12 trial.

13 I didn't hear Mr. Thackston agreeing we wouldn't do
14 that, and we are going to talk about deposition and
15 interrogatories and other materials in Dr. Moline's report. I
16 just want to be very clear on this record [REDACTED]

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED] That's part of the protective order until we
21 get to the point where the district judge either agrees or
22 disagrees.

23 Is that fair?

24 **THE COURT:** I think that was what I had indicated.
25 And I'll note that the district judge would be making that

1 determination under a different standard. So it wouldn't just
2 be agreeing or disagreeing. It would also be having to take
3 into account the greater public access or rights to judicial
4 records that would apply at dispositive motions and at trial.
5 So while the district judge might agree with me as to discovery
6 materials, we all might end up coming to a different conclusion
7 if it's something that is presented at trial.

8 So I'm not making any indication one way or the other
9 how or what that might be or what that might look like, but
10 that would be part of the determination here for the current
11 filings and the treatment of that information before or until
12 any other determination is made by the district judge in
13 whatever context it might be presented there.

14 Does that clarify, Ms. Kagan, the piece that you were
15 looking at?

16 **MS. KAGAN:** Yes, and that would include the
17 transcript of today's hearing as well?

18 **THE COURT:** And I will tell you as to that, under the
19 ordinary rules, if someone requests a transcript, then it will
20 be prepared and filed, and it's automatically sealed, I think,
21 for 15 days. And during that time period, if you file a motion
22 to seal and set out the basis for that request and specifically
23 designate exactly what parts need to be sealed as narrowly as
24 possible, then it will stay under seal until the Court rules on
25 that and makes that determination.

1 **MS. KAGAN:** Thank you.

2 **MR. GREVE:** Your Honor, this is Kurt Greve with AII.

3 Just one quick question just to make sure I understand. The

4 limitation that you provided [REDACTED]

5 [REDACTED]

6 [REDACTED] and

7 that is the motion that is currently pending before the Court;

8 correct?

9 **THE COURT:** Well, is there some other identification
10 or information I should know about?

11 **MR. GREVE:** Yes.

12 (Cross-talking.)

13 **THE COURT:** Wait. I need you all to wait and let me
14 designate who's next, or else we're going to end up with too
15 many folks talking over each other.

16 So, Ms. Kagan, let me let you finish. I think
17 Mr. Greve had jumped in, but let me let you finish, Ms. Kagan,
18 and then I am going to go to Mr. Thackston and he can bring in
19 Mr. Greve if he needs to.

20 So, Ms. Kagan?

21 **MS. KAGAN:** Thank you, Your Honor.

22 The identification that I thought you and I -- that
23 we had been discussing during this hearing [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED] [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 [REDACTED] that would remain confidential
8 until the district judge makes a determination on that final
9 issue.

10 **THE COURT:** So, Ms. Kagan, let me just finish as
11 well. The motion to quash as to Northwell, it's not that you
12 are necessarily opposed to providing whatever information may
13 be appropriate as part of the expert disclosures; your issue
14 there is whether it should come from Northwell. Is that
15 correct?

16 **MS. KAGAN:** That's correct. The information
17 requested is information that would be in the custody and
18 control of Dr. Moline and properly requested through a duces
19 tecum pursuant to a notice of deposition.

20 **THE COURT:** All right. So if we need to address any
21 of that further, we can, but I'll assume that you're going to
22 make the information within the scope of expert discovery
23 available to them directly from Dr. Moline; is that right?

24 **MS. KAGAN:** Everything that is unobjectionable, yes,
25 Your Honor.

1 **THE COURT:** So I guess what I think I'll let you do
2 is work those particulars out, but I am only -- or would only
3 be quashing that as to Northwell based on the premise that
4 you're providing anything that's appropriate for expert
5 discovery as part of the disclosures and discovery of
6 Dr. Moline. I don't want to get into another round of
7 withholding information that needs to be provided if she's
8 going to be presented as an expert.

9 Is there anything in particular that we need to
10 address on that?

11 **MS. KAGAN:** I know from conversations with Dr. Moline
12 one of the items that she had an objection to and that is not
13 discoverable is her employment contract with Northwell. It has
14 nothing to do with her bias or credibility. It has nothing to
15 do with the amount she has billed us for her time in this case,
16 and unless there is case law that says that her employment
17 contract as the head of the Occupational Medicine Department at
18 Northwell and as a professor at Hofstra Medical School is
19 somehow discoverable, that would not -- that would be an
20 example of something that she personally objected to and also
21 is not part of the scope of normal expert discovery under Rule
22 26 and Rule 30.

23 **THE COURT:** All right. That may be something that I
24 will let you all address and work out, and I'll hear from
25 Mr. Thackston on that as well, but it may be worth you all

1 determining -- particularly whether it's something that could
2 be provided on an attorneys-eyes-only basis, just to make a
3 determination of whether that is something that would have a
4 sufficient basis for discovery or disclosure here, but I think
5 as to that particular, I will let you all do a further
6 meet-and-confer on that before we address that, but I will hear
7 from Mr. Thackston first on that.

8 Anything else, Ms. Kagan?

9 **MS. KAGAN:** No, Your Honor, thank you.

10 **THE COURT:** All right. So, Mr. Thackston, let me
11 come back to you then with respect to the motion to quash,
12 motion for protective order, and motions to seal, and then if
13 there is something that Mr. Greve had to raise in addition,
14 then I'll let you indicate that or defer to him on that.

15 **MR. THACKSTON:** Okay. Yes, Your Honor. I think what
16 I heard the request to be was that the Court enter a
17 restraining order against defense counsel [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED] [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 So I don't think that the Court intends its order

1 about confidentiality of anything we might get from Northwell
2 to include some type of prohibition on talking about materials
3 that we have from other sources, particularly something that's
4 probably in the congressional record. I just want to make
5 sure --

6 **THE COURT:** Here's the issue with that,
7 Mr. Thackston, because you had that information, [REDACTED]

8 [REDACTED]
9 [REDACTED] [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 And so that would be part of the concern. If you
14 want --

15 **MR. THACKSTON:** I --

16 **THE COURT:** Mr. Thackston, let me finish.

17 **MR. THACKSTON:** I'm sorry.

18 **THE COURT:** [REDACTED]

19 [REDACTED]
20 [REDACTED] [REDACTED]
21 [REDACTED]
22 [REDACTED] [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 **MR. THACKSTON:** Well, Your Honor, I don't want to
2 undue what we've done. I guarantee you we will not violate the
3 Court's order with respect to any information we get from
4 Northwell until we have a chance to have a hearing on that.

5 [REDACTED]
6 [REDACTED] we could submit a list of the cases for which we
7 have a -- for which we have a release and -- because -- I mean,
8 to say something is confidential is not the same thing as to
9 say it's not discoverable.

10 Dr. Moline said in her deposition it would be
11 possible to redact materials to take out any personal health
12 information -- any personal identifying materials, and if one
13 of -- I would just ask a yes or no -- if we submit a list of
14 the cases for which we have a medical authorization, can we get
15 a yes or no from Northwell that can't be used, and then -- and
16 then at least take up the possibility of redacting materials so
17 that we could say, look, Case No. 6, you said they had no other
18 possible exposure, but the deposition of the Plaintiff says
19 they worked in a textile mill. So we would have some ability
20 to question her about her methodologies without disclosing
21 all -- who we're talking to -- about. It doesn't really matter
22 who it is, but it is a scientifically valid methodology to have
23 an expert in a case evaluate -- subjectively evaluate discovery
24 materials.

25 **THE COURT:** So --

1 **MR. THACKSTON:** I just ask --

2 **THE COURT:** -- I understand the request, again,
3 there, Mr. Thackston, [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED] [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 **MR. THACKSTON:** Okay.

23 **THE COURT:** Let me pause a minute. It looks like --
24 we are recording this, but there was some feedback there, and
25 so I don't know if that's coming on my end -- we might need to

1 restart -- or whether that's someone who is on the line, that
2 we can clean that up a little bit.

3 **MR. SCHROLL:** Your Honor?

4 **THE COURT:** Yes.

5 **MR. SCHROLL:** This is Matthew Schroll on behalf of
6 Colgate. May I be heard on this issue?

7 **THE COURT:** Sure. Actually, let me make sure that
8 we're recording okay, and then I will go through the other
9 Defendants as well before -- okay. It sounds like we've gotten
10 it cleaned up.

11 So with respect to that then, I think, Mr. Thackston,
12 as to the motion to quash, what I would intend to do is allow
13 that just as to any remaining requests without prejudice to
14 making those requests as part of expert discovery.

15 Is there something else we need to address on that?

16 **MR. THACKSTON:** I don't think so, Your Honor,
17 unless -- I would like to speak to the employment contract
18 briefly.

19 **THE COURT:** Okay.

20 **MR. THACKSTON:** The only thing -- and perhaps they
21 can tender it in camera or whatever, but the only thing I'm
22 looking for is that Dr. Moline says that she gets paid directly
23 for her personal time that she spends on cases, and then when
24 she spends case -- when she spends company time on cases, the
25 company gets paid. In other cases, I have seen situations

1 where there is also a bonus provision based on the amount that
2 someone brings in.

3 So I'm just trying to figure out whether there's
4 something in her contract that says: And part of the money
5 that Northwell gets she also gets. I'm happy for them to
6 redact every other word in the employment agreement other than
7 any provision that relates to any amount of bonus that she
8 might get for the money that she brings in through her expert
9 consulting work.

10 **THE COURT:** So what may make sense on that, since
11 that's sort of a contingent-type request, is to clarify that in
12 the deposition; and then if there is some sufficient link there
13 or basis to provide or -- to get that information, that she can
14 then provide that with the redactions as part of that. It may
15 be more efficient to let that be clarified rather than for me
16 to try to make some determination that's based on a lot of
17 contingencies or things that we are not aware of or clear of.

18 **MR. THACKSTON:** Okay.

19 **THE COURT:** So let me go to the other Defendants now
20 because I do want to make sure that I've heard from everybody.

21 Mr. Schroll, you wanted to be heard for Colgate?

22 **MR. SCHROLL:** Yes, Your Honor, thank you.

23 Just two things, I think, on this issue is I
24 understand the Court's order, and just for purposes of the
25 record, I just wanted to put Colgate's objection on the record

1 as to the confidentiality order. We weren't -- it obviously
2 wasn't our subpoena, and we weren't a party to the motions
3 practice, but I just -- for purposes of the record, I just
4 wanted to put in an objection that we would respectfully
5 disagree and adopt AII's position on that, and I need not add
6 anything else to that.

7 **THE COURT:** Okay. Well, it's helpful to me, though,
8 to understand exactly what that is. Is the issue that you want
9 to be able to use that in other cases, or what's the issue?

10 **MR. SCHROLL:** Well, Your Honor, if I understand your
11 order, it's still open for the judge's discretion at trial.
12 And I understand the difference between trial and discovery,
13 and, you know, I would suggest that the information that is
14 contained [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]. It will come from Dr. Moline
18 testifying at trial. Any local news reporter, anyone off the
19 street will be able to sit at trial and hear that information
20 because [REDACTED]

21 [REDACTED], and they will put
22 it into evidence at trial and ask a jury to award them millions
23 and millions of dollars against -- from the Defendants.

24 So, you know, I understand that this is going to be
25 left open for the trial judge, and that's why I said we accept

1 the order, but we just put our objection on this so we can
2 preserve it for the record for -- if it gets revisited at
3 trial. And so I would say that that's sort of -- I'm looking
4 ahead, Your Honor, that even though this wasn't my subpoena or
5 my motion, I want to be on record that Colgate reserves the
6 right to litigate this at the appropriate date, as Your Honor
7 indicated.

8 **THE COURT:** All right. And just to make sure I'm
9 being clear, I am not making any sort of finding that it would
10 be confidential if it is ultimately presented at trial or what
11 pieces or parts may be confidential if it's ultimately
12 presented at trial.

13 My determination here is solely for discovery
14 purposes and proceedings now before the Court, that the fact
15 that this was disclosed in discovery is still treated as
16 confidential information the way any information would that's
17 produced in discovery and designated confidential in a consent
18 confidentiality agreement in the type that are ubiquitous in
19 these cases and in other cases before the Court.

20 So just because something is designated as
21 confidential or protected as confidential in discovery does not
22 mean that that's going to control ultimately when it's
23 presented as dispositive motions or, more importantly, at
24 trial, and that would be subject to a separate determination
25 under the federal rules and the local rules.

1 So I want to make sure that I'm clear, too, that
2 I'm -- it would not be necessary to revisit anything. It would
3 be a whole new determination that would be made once or if
4 something is presented at trial or on dispositive motions.

5 Does that help, Mr. Chesson -- or, excuse me,
6 Mr. Schroll? I'm sorry. That was my mistake.

7 **MR. SCHROLL:** Yes, Your Honor. Like I said, I just
8 wanted to put on the record that we adopt AII's position with
9 all this, because I don't want to be in a situation where
10 perhaps AII is not at trial, Colgate is at trial, and
11 Plaintiffs take a position that we -- this was not our
12 argument, this was not our subpoena, and so on. So I just want
13 it to be on the record that we adopt AII's position and any
14 objections that they have made.

15 And then I have -- the other point, Your Honor, I
16 raise is that with respect to identifying information [REDACTED]
17 [REDACTED] I -- I don't know if that's -- I would
18 suggest that that -- that the Court not enter an order on that
19 at this time. That is the subject of a discovery dispute that
20 recently finished the meet-and-confer process with Plaintiffs,
21 between Plaintiffs and Colgate, and that the Court has not had
22 the opportunity of full briefing on that issue.

23 I will note that we're in a little bit different
24 position than Clubman because Colgate was a defendant in about
25 half the cases that are part of the 33 cases that Dr. Moline

1 has, and I would just ask that -- you know, I understand what
2 the Court's sort of initial reaction is in talking with
3 Mr. Thackston, but I would just ask that the Court defer on
4 that without -- until the Court has the benefit of full
5 briefing on that issue.

6 **THE COURT:** All right. So I wasn't aware of that,
7 and I thought that was raised -- or what was before me as part
8 of the motion for protective order, at least as it relates to
9 Dr. Moline and Northwell.

10 Is there still something else as to those folks?

11 **MR. SCHROLL:** Yes, Your Honor. We're going -- I
12 believe that Colgate will move to compel the underlying data as
13 to identities for the individuals of Dr. Moline's article and
14 Dr. Emory's article, which currently isn't a subject of this
15 dispute, but I don't believe that there's -- the real focus
16 that I perceive from these motions and from the arguments that
17 have been presented here has been the focus on the disclosure
18 that was made by Northwell [REDACTED]
19 and that Northwell has not filed its own motion to quash and
20 that the identities [REDACTED] -- the Court would
21 benefit from a different perspective because Colgate has been a
22 defendant in many, many more of the cases than AII was, and so
23 we -- we're in a different position than AII on that. And the
24 meet-and-confer wrapped up last week. So that's why it wasn't
25 part of this here, and we haven't filed a motion yet, but we

1 believe that now it's ripe, and it will be about Dr. Moline's
2 article and also Dr. Emory's article, who -- just -- the
3 Court's indulgence, Dr. Emory is another expert who had a
4 similar article using data from exclusively cases that she
5 received in litigation, the same position, and so we think that
6 that is a little bit different perspective from Colgate on that
7 issue, and I would ask that the Court reserve on that until
8 Colgate has had the benefit of briefing that and arguing that
9 before Your Honor.

10 **THE COURT:** All right. Well, I'm trying to balance
11 that with the need to go ahead and resolve the ones that are
12 before me, at least as to AII. And I think you've heard my
13 thoughts on that and generally how it seems to me; but then
14 since Colgate hasn't briefed that, if there are additional
15 arguments that you want to raise, then I can certainly consider
16 those, but what I'm inclined to do is go ahead and address them
17 to the extent they have been raised with respect to AII, but
18 with leave for Colgate to raise that further if there is
19 something else that you want the Court to consider further.

20 **MR. SCHROLL:** Yeah, and, Your Honor, just to be
21 clear, my understanding was that -- central to this dispute was
22 that it was a subpoena to Northwell. Earlier in this case,
23 Plaintiffs made clear that their position was that they viewed
24 these types of subpoenas as improper. After that was made
25 clear to Colgate, Colgate then propounded requests for

1 production. Plaintiff responded. We had our meet-and-confer,
2 and now that's all teed up. So we would be moving to compel on
3 the basis of discovery requests, which is different than the
4 issue with the Northwell subpoena. And so, Your Honor, I would
5 just suggest that, you know, we be afforded the benefit of
6 being heard on that as it relates to Colgate.

7 **THE COURT:** All right. Well, I think that's what I
8 indicated, Mr. Schroll, just in the sense that I would grant
9 the motion for protective order just to -- in the limited sense
10 that I've set out as well as granting the motion to quash as
11 moot to the extent that that would be then pursued as part of
12 party discovery.

13 I'm not intending to hear from AII again on this
14 because I think they've briefed the issue and I've considered
15 it, but I can reserve the ability to consider further as to
16 Colgate since you have not yet briefed that, and I want to give
17 you the opportunity to do that.

18 So I think that's consistent with generally your
19 suggestion there, other than maybe just the fact that I am
20 making the determination to the extent it's been presented as
21 to AII with respect to both the motion to quash and the motion
22 for protective order; but I understand if you've gone about it
23 through party discovery, as may have been otherwise called for,
24 and need additional opportunity to need to be able to bring
25 that before the Court.

1 Again, I've indicated I've got concerns about that,
2 but I will let you present whatever you may want to present, if
3 it's separate for Colgate, so that you can brief that and I can
4 consider whatever you may want to present there.

5 **MR. SCHROLL:** Thank you, Your Honor.

6 **THE COURT:** All right. Mr. Peck, anything for
7 Cyprus?

8 **MR. PECK:** No, Your Honor. Based on the position of
9 Cyprus in this case, we don't have anything to add on this
10 dispute.

11 **THE COURT:** Okay. Mr. Tomlin, for Whittaker Clark &
12 Daniels?

13 **MR. TOMLIN:** Nothing further, Your Honor.

14 **THE COURT:** All right. So let me come back around.
15 There's still the last matter of Colgate's motions and
16 scheduling that I would like to take up and that we need to do
17 quickly. So I don't want to do any more extended discussion on
18 this, but, Ms. Kagan, just with respect to the present motions,
19 anything else that you needed to be heard on?

20 **MS. KAGAN:** No, Your Honor.

21 **THE COURT:** And, Mr. Thackston, anything else?

22 **MR. THACKSTON:** No, Your Honor.

23 **THE COURT:** All right. So as to those, what I'm
24 going to do will be as to the motion to quash, No. 168, I am
25 going to grant that as (audio glitch) as to any remaining

1 requests -- we're getting some feedback again.

2 So we're getting a lot of feedback, folks. We think
3 it may be from one of the parties. It's making it difficult to
4 make a recording.

5 All right. Now, we're back. So I don't know who it
6 was that may have just joined or muted, but whatever that may
7 have been, it prevents us from getting a good recording. So
8 hopefully we've got that now.

9 All right. So as to the motion to quash, No. 168,
10 that would be granted as to any remaining requests, without
11 prejudice to making appropriate requests as part of the expert
12 discovery process, as we've discussed. As part of that, as
13 I've initially indicated, I did not find any bad faith or
14 unreasonable conduct with respect to that and the particular
15 circumstances that were presented here; but for any remaining
16 requests, the parties will address those as part of expert
17 discovery rather than by subpoena to Northwell. So that will
18 be the -- 168 would be granted to any remaining requests.

19 As to the motion for protective order, which is
20 No. 179, I will deny the request that [REDACTED]
21 [REDACTED], but I will allow Plaintiff
22 to designate that information as confidential and limited
23 solely to this case, and the motion for a protective order
24 would be granted to that extent.

25 Again, that is just as to a claim for confidentiality

1 during discovery, which means that any filing of that
2 information would need to be accompanied by a motion to seal
3 pursuant to Local Rule 5.4. However, the Court is not making
4 any ultimate determination as to whether that information
5 should be sealed if it is presented and considered as part of
6 dispositive motions or at trial since that would be subject to
7 different standards that would apply.

8 In that respect, the motions to seal, No. 180 and
9 No. 200, will be granted with respect to the present filings
10 related to discovery disputes, as those are not subject to
11 First Amendment protections that would apply to filings on
12 dispositive motions and at trial. Again, whether those should
13 remain under seal ultimately would be a matter for the trial
14 judge in this case, and so those things would need to be filed
15 with a motion to seal consistent with Rule 5.4 until that issue
16 is ultimately determined by the trial judge.

17 With respect to the motion for a protective order as
18 to discovery or inquiry into the identity of [REDACTED] human study
19 subjects, that will be granted with respect to Plaintiffs'
20 Motion 179 as to AII and the subpoena to Northwell, and I will
21 find that based on the discussion [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED] and that was part of our extensive earlier

1 discussion. I won't repeat all of that here, but I will also
2 note that to the extent Colgate has indicated some requests to
3 be able to address and brief that, I will consider that, and I
4 will allow the parties to fully brief that before I make any
5 determination on the request that Colgate may raise.

6 So as to the present motion for a protective order,
7 it would be essentially granted, except that denied with
8 respect to the documents [REDACTED],

9 and those can be included as part of the discovery in this
10 case, but that information is confidential and limited solely
11 to this case, and that is specifically [REDACTED]

12 [REDACTED]. If there is any reason to revisit that
13 further and as well if there is any reason to address a further
14 motion that may be filed, including by Colgate, then those are
15 matters that the Court can take up once they are briefed and
16 presented.

17 So I think that takes care of, again, 168, 179, 180,
18 and 200. For the clerk, 168 would be granted as to any
19 remaining requests without prejudice to making requests as part
20 of expert discovery. 179 will be denied in part and granted in
21 part, as set out during the hearing. And motions to seal, 180
22 and 200, will be granted with respect to the discovery
23 disputes.

24 And, Ms. Kemp, I will indicate specifically to you,
25 as to 179, just note it's denied in part and granted in part on

1 the docket entry as further set out in the hearing, because
2 parts of that may be subject to claims of confidentiality, and
3 we'll let the parties address that once the transcript is
4 ordered and docketed. So we can just -- the docket entry can
5 just show granted in part and denied in part, and the details
6 will be as set out in the transcript.

7 All right. The last piece we have is the scheduling
8 and Colgate-Palmolive's motion -- we're getting the feedback
9 again.

10 **COURTROOM DEPUTY CLERK:** Judge Peake, I'm not sure
11 what's going on with the line. I never had these difficulties
12 before. Usually, it's clear.

13 **THE COURT:** I'm concerned about the ability to make a
14 transcript because the level of interference that we're getting
15 is increasing. If we still have this conference line, what we
16 could do is take a five-minute break, and then see if we come
17 back and get a cleaner line. It does seem to come and go, so
18 it's possible we're getting feedback from -- see, it's clear
19 again. It's possible we're getting feedback from other folks
20 on the line.

21 **COURTROOM DEPUTY CLERK:** Maybe we can take a recess,
22 Your Honor, and try to call back in. Maybe that would help.

23 **THE COURT:** Why don't we do that. Let's take a
24 five-minute recess. Everybody disconnect and then call back
25 in, and we'll see -- and I'll ask our IT folks to come down and

1 get us straightened out and see if we can get that cleaned up,
2 and then we'll take up these last matters.

3 **COURTROOM DEPUTY CLERK:** Yes, Your Honor.

4 **THE COURT:** All right.

5 (Pause in the proceedings.)

6 **THE COURT:** All right. I apologize to the extent we
7 may have had some technical difficulties on this end.
8 Hopefully, we've got that cleared up now, and hopefully the
9 transcript is clear enough. There were a few places where
10 there may have been some feedback. It may make it difficult
11 for the court reporter, and if there is anything that I need to
12 do by written order to clarify further, certainly, I can do
13 that; but, hopefully, we should be able to get a recording of
14 this, if we need it.

15 So I think we were ready for Colgate-Palmolive's
16 motions, and that involves just general scheduling as well.
17 With respect to that, there was -- No. 185 is the motion for a
18 telephone hearing, and that's granted based on this hearing
19 that we're having today. There's the motion for leave to
20 designate Dr. Attanoos as an alternative expert, and the motion
21 to extend dispositive motions deadline.

22 What I think I'll do is let's take up Dr. Attanoos,
23 and you can correct my pronunciation on that, Mr. Chesson or
24 Mr. Schroll. Let's consider that one first.

25 Consistent with how I operated earlier, I think I

1 gave you my general indication that we could reserve the
2 ultimate determination with respect to whether there is a need
3 to substitute Dr. Geyer, if he's ultimately not available, and
4 reserve that question, but, in the meantime, let you go ahead
5 and proceed with Dr. Attanoos in order to reduce any potential
6 prejudice to the Plaintiff so that that's well in advance and
7 that you all get that resolved either by a deposition of
8 Dr. Geyer or a motion to substitute by February 15th so that
9 you're sufficiently in advance of trial, but Mr. Chesson or
10 Mr. Schroll, I will hear from you with respect to that motion
11 and how you would propose to proceed on that.

12 **MR. SCHROLL:** Thank you, Your Honor, Matthew Schroll
13 on behalf of Colgate.

14 In the interest of time, I think that your overview
15 is essentially what we've asked for in our motion, which is
16 that we hope for the best that Dr. Geyer makes a full recovery,
17 but we prepared for the worst. And, Your Honor, it is our
18 position that waiting until February or March to make that
19 determination would possibly result in prejudice to Colgate
20 because it does take time to ship pathology materials and for
21 Dr. Attanoos to review them and generate his report and sit for
22 deposition.

23 And Colgate is being proactive on this. We're not
24 waiting until the last minute because, you know, I think that
25 if we did, Plaintiff would correctly accuse us of a delay

1 tactic and say that we're trying to deny Plaintiff his day in
2 court, and we're trying our best to avoid that and be proactive
3 and up front with the Court about the situation.

4 You know, I think it was in our joint status report,
5 Your Honor, it wasn't in our motion, but the latest news that
6 we had and I shared with counsel was that Dr. Geyer suffered a
7 heart attack and that he's likely to be recovering for the rest
8 of the year. So, you know, I think that Your Honor's
9 suggestion that we proceed with Dr. Attanoos and then revisit
10 to see what Mr. Geyer's condition is the most appropriate
11 action at this time.

12 **THE COURT:** What I would assume then, Mr. Schroll, is
13 that Dr. Geyer is still the designated expert at this point,
14 and for dispositive motions, you're going with that and nothing
15 about Dr. Attanoos would affect that, and that just as a
16 contingency option or alternative, you can proceed with
17 providing the materials and getting the expert report with the
18 understanding that that would only be in the eventuality
19 Dr. Geyer is unavailable and still subject to or requiring a
20 motion to substitute so everything can get fully heard at that
21 point. I think by doing it that way, you reduce any concern as
22 to the potential prejudice to Plaintiff for doing it too late
23 or before trial.

24 Is that consistent with your understanding?

25 **MR. SCHROLL:** Yes, Your Honor. As pointed out by

1 Plaintiff, Dr. Geyer is here in the United States, and, you
2 know, I would like to have all my experts appear live at trial.
3 That would be my preference. So, you know, we don't know what
4 the world is going to be like in April, but, you know, I think
5 your summary is where we stand.

6 **THE COURT:** All right. Let me go to Ms. Kagan with
7 respect to that. Anything else we would need to address on
8 that?

9 **MS. KAGAN:** I think Your Honor has given her
10 tentative on this, and we do still raise a strong objection to
11 Ms. Bell's original pathology materials leaving the United
12 States and traveling to the United Kingdom, because if
13 Dr. Attanoos decides to not return them, we do not have any
14 recourse. Certainly, we could file a motion to compel against
15 Colgate, but Colgate can't go get them back from the United
16 Kingdom, and there is nothing we can do to compel them.

17 That aside, we also have very strong concerns -- and
18 I'm very sensitive to the fact that Dr. Geyer is not well, and
19 I told this to Mr. Schroll; and if Mr. Schroll chose an expert
20 who is legally allowed to be employed in the United States and
21 who pays taxes in the United States on that income, I would
22 certainly have no objections at all whatsoever; but at this
23 point, because Dr. Attanoos is not legally allowed to travel to
24 the United States for employment and yet he intends to do that
25 and make income from the United States that he doesn't pay

1 taxes on, we have a strong objection to being party to
2 continuing to support his ability to do that. And if he
3 doesn't intend to travel to the United States to testify at
4 trial, that creates substantial prejudice to Plaintiffs.

5 With all of that said, what I had proposed to counsel
6 for Colgate and what I think the Court is saying is consistent,
7 that we can wait and see how Dr. Geyer is. He is the
8 designated expert, and then come February 15th, we can reassess
9 what the situation is and the availability of Dr. Geyer.

10 I do still have very strong objections to Mrs. Bell's
11 actual pathology materials, her actual tissue, leaving the
12 United States and going anywhere out of this country.

13 **THE COURT:** Is there anything else you need to do
14 with those tissues?

15 **MS. KAGAN:** There is nothing that we need to do, but
16 it is evidence, and so if that evidence is destroyed or not
17 returned to us, then there is no way that we would be able to
18 meet the best evidence rule to show that, in fact, these slides
19 demonstrate and these tissue demonstrate that she has this
20 bilateral pleural plaque, which every expert agrees is a
21 signature of asbestos exposure, undisputed.

22 **THE COURT:** So wouldn't that just be subject to all
23 the ordinary spoliation rules? I mean, we could send it to an
24 expert in Greensboro and have it end up destroyed in some act
25 of God that no one anticipated or by negligence of the expert

1 in how they handled the material. In whatever the scenario
2 might be, the federal rules give us a lot of guidance. Those
3 are not the sort of first times those things may have happened
4 in terms of spoliation and how we hold those against the
5 parties in the case and protect the plaintiff from any
6 prejudice on that.

7 It seems like we could address that the same way --
8 Colgate is going to be responsible for it. If they choose to
9 send it overseas, it's their responsibility under the
10 spoliation rules, the same way even if someone here in
11 Greensboro had a fire in their lab and lost the whole thing or
12 negligently sort of dropped it or left it somewhere.

13 I mean, it seems to me that we can address those
14 things. It's a risk no matter what the expert may be -- or who
15 the expert may be, but we'll put that burden on Colgate,
16 depending how much they trust this expert and the risk that
17 that might assume if there's any problem with getting any
18 materials back.

19 Any reason why it wouldn't just be subject to those
20 same ordinary principles?

21 **MS. KAGAN:** Your Honor is correct; it would be
22 subject to those principles, including an adverse inference
23 charge and spoliation, but the risk is increased when these
24 materials are being sent, not to Duke here locally or even New
25 York, but they are being sent overseas. But it's not necessary

1 because we don't actually know that Dr. Geyer will not be
2 available to testify in April. And I had offered counsel for
3 Colgate to hold off on his deposition, because we have deposed
4 him many times before. He doesn't contest the diagnosis, and
5 we can wait for his causation opinions sometime in 2021.
6 That's not something that I need to oppose dispositive motions
7 and they have indicated they don't need for their dispositive
8 motions.

9 **THE COURT:** Well.

10 **MS. KAGAN:** Just the fact --

11 **THE COURT:** I'm sorry. Go ahead, Ms. Kagan.

12 **MS. KAGAN:** It's simply that the risk is so much
13 higher by these materials going overseas when the need is not
14 really clear at this point in time.

15 **THE COURT:** So the alternative, though, Ms. Kagan,
16 would be then I treat that as a waiver of any prejudice with
17 respect to it being too late or too close to trial; and so if
18 we wait until closer to trial to send this information to
19 Dr. Attanoos to provide a report, you may not get a report
20 until the day of trial or trial has already commenced. I would
21 assume you would have wanted that information sooner rather
22 than later.

23 **MS. KAGAN:** Under normal circumstances, I would agree
24 with Your Honor, but as I wrote in our briefing, Dr. Attanoos'
25 reports are identical. His opinions in every case in these

1 talc cases are identical. It's never the asbestos that causes
2 the mesothelioma. It's always the person's age, there's some
3 genetic mutation, so forth and so on. So I am less concerned
4 about an opinion from Dr. Attanoos that I've never seen before.
5 I'm much more concerned about him not actually showing up for
6 trial and me not being able to fully and fairly cross-examine
7 him in front of a jury.

8 **THE COURT:** All right. Well, that's a different
9 issue; right? Whether he can appear or not would be a separate
10 issue and whether you can address that by a video deposition in
11 advance of trial and be prepared for trial, but I just want to
12 make sure that I'm correctly understanding how you're balancing
13 all of these things.

14 If we treat Dr. Attanoos as being sort of disclosed
15 as a potential alternative at this point and Plaintiff agreeing
16 that even if his report is not provided until trial begins,
17 that there wouldn't be prejudice there that would preclude
18 substituting him for Dr. Geyer, I can note that and take it
19 into account if that's at this point what you would sort of
20 represent.

21 **MS. KAGAN:** I think based on the amount of time that
22 we still have and the uncertainty with Dr. Geyer's recovery
23 period -- you know, we're still in September. I think it
24 probably would be most prudent, as I had suggested at our
25 meet-and-confer, to reconnect in January on this issue and

1 determine whether or not Dr. Geyer is well enough to sit for
2 deposition, whether he intends or will be able to come to
3 trial, and have that meet-and-confer conversation. And if at
4 that point it's clear that his recovery has not gone well or
5 he's no longer going to be testifying, even though apparently
6 Defendants continue to disclose him and swear under oath that
7 he will be available to testify as recently as two weeks ago --

8 **THE COURT:** Well, Ms. Kagan, that's the sort of thing
9 that doesn't help, though. It really doesn't. We understand
10 that they have disclosed him. He is their expert right now, to
11 the extent he's available. We all understand the concern with
12 respect to which he might not be available.

13 I have some concerns about putting it off until
14 January if the response then is going to be that it's too late
15 or there's not enough time to get the sample to him or for him
16 to be able to provide a report or it's somehow going to
17 prejudice Plaintiff at that point, which is why I'm inclined to
18 allow them to go ahead and get the reports prepared, if they
19 are so inclined, still with the caveat that Dr. Geyer is the
20 expert. He's the one who is intended and expected, but there
21 may be a need to substitute based on the health concerns and
22 that as much notice as possible generally helps reduce the
23 prejudice on all sides.

24 It's sounds like really the only reason to wait is so
25 that the sample doesn't get sent overseas until later; is that

1 right?

2 **MS. KAGAN:** That's correct, Your Honor, until
3 absolutely necessary.

4 **THE COURT:** All right. So let me go back to
5 Mr. Schroll with respect to that. Are you intending to send
6 the sample to Dr. Attanoos, or how would that work?

7 **MR. SCHROLL:** Yes, we are, Your Honor.

8 And I just want to note here that they've raised this
9 as a potential issue, but I don't see anything in their brief
10 about this happening before or that there's any unusual risk as
11 to Dr. Attanoos other -- any different than the risk that Your
12 Honor raised about sending it to Dr. Geyer in Pittsburgh or
13 anywhere else. It travels in some cases by plane via FedEx or
14 UPS, or however it's sent.

15 I'm not really seeing a factual record here that
16 would preclude Dr. Attanoos from physically handling the
17 pathology material. I will note he does it routinely all the
18 time, as Plaintiffs' brief shows you. They say, you know, he
19 makes all this money from testifying in all these cases.
20 That's exactly what he does in all these other cases. So, you
21 know, I don't see a risk here, and I agree that Colgate would
22 be subject to spoliation sanctions, just as we would if
23 Dr. Geyer lost the materials.

24 And I would add, Your Honor, that all this
25 uncertainty about what's going to happen in February, whether

1 Dr. Attanoos can travel to the United States -- and, you know,
2 I'll also add that Dr. Attanoos has a day job. He just didn't
3 sit here and look at pathology materials for litigation at the
4 drop of a hat. So, you know, I think all of this uncertainty
5 is exactly the reason why we would suggest that that review by
6 Dr. Attanoos happen now and proceed based on -- and reassess
7 about Dr. Geyer's condition after the New Year and see, and we
8 are then able to decide what's going to happen.

9 **THE COURT:** All right. So what I'm going to do as to
10 No. 169, which is Colgate's motion for leave to designate an
11 additional expert, I'm going to grant that in part to the
12 extent that Colgate can choose to designate an additional
13 expert as a potential alternative and subject to filing a
14 motion to substitute by February 15th if Dr. Geyer is
15 unavailable, and that as part of that, they can undertake
16 whatever ordinary testing they may choose to do, subject to the
17 ordinary spoliation rules.

18 I'm not going to supervise or try to manage the tax
19 compliance on the party's expert. I'm also not going to give
20 any particular orders to an expert or tell Colgate who they can
21 choose as an expert on that, but I will leave on Colgate the
22 risk with respect to any spoliation or any other similar
23 concerns regarding the materials and the samples.

24 To make sure that's clear then, at this point it
25 would be leave to go ahead and undertake that expert report and

1 review, but subject to further motion to designate or
2 substitute Dr. Attanoos if Dr. Geyer is not available, and it
3 would be limited in scope not to go beyond Dr. Geyer in the
4 sense that it would not provide an additional late expert on
5 matters that weren't already addressed or covered. And it
6 would be then by February 15th either a deposition of Dr. Geyer
7 or a motion to use Dr. Attanoos at trial in lieu of Dr. Geyer,
8 if that's necessary at that point.

9 So let's see. Mr. Schroll, is that clear enough that
10 I'm not making it a final determination that Dr. Attanoos is
11 now an expert or a testifying expert in this case? That would
12 need to still be subject to a motion and only if Dr. Geyer is
13 not available, but you can go ahead and undertake that if you
14 choose to do that in the meantime so that you have that as an
15 option to offer to the Court for further consideration and
16 determination at that point.

17 **MR. SCHROLL:** Thank you, Your Honor.

18 **THE COURT:** All right. So, Ms. Kemp, No. 169 can
19 show granted in part, as set out at the hearing, subject to
20 further motion, if necessary, by February 15th.

21 **COURTROOM DEPUTY CLERK:** Yes, ma'am.

22 **THE COURT:** All right. Thank you.

23 And then we have No. 183, which is the motion to
24 extend dispositive motions deadline. It looks like that may
25 have been necessitated by some delay on the expert depositions;

1 and while I don't have a motion to extend as to those expert
2 depositions, if that's otherwise happening by agreement, I
3 could allow that, but it would seem appropriate to adjust the
4 response and reply times for everybody in order to adjust and
5 accommodate that.

6 But, Mr. Schroll, let me start with you as to that so
7 we can get a sense of where we are on that.

8 **MR. SCHROLL:** Yes, Your Honor. And I think, you
9 know, as a starting point, in our motion, you know, we raised a
10 reference to a few depositions that were postponed to after the
11 September 21st deadline. My last count, keeping track of
12 everything, is that we currently have 20 depositions scheduled
13 between now and November 3rd and, you know, after the Court's
14 September 21st order.

15 Colgate contends that a few of those have
16 case-specific opinions that bear on summary judgment. Those
17 depositions were scheduled to occur before the deadline, and
18 everything was amazingly going to work out, given the time
19 frame that we had. Unfortunately, some of those depositions
20 were postponed. Some -- as we laid out in the motion, one
21 expert had health issues, for example.

22 So, you know, through no fault of the diligence of
23 the parties, you know, these depositions just had to be
24 rescheduled; but we're in a position now where, with summary
25 judgment due Monday, as it comes to Colgate -- and I don't know

1 how the other Defendants feel, but as it comes to Colgate, we
2 don't have those depositions completed. So, you know, we would
3 not be in a position to file our dispositive motion.

4 And so, you know, I really filed this motion looking
5 for guidance from the Court because we understand from the
6 Court at the last hearing you set a deadline for summary
7 judgment -- or altered the discovery deadline I think with
8 summary judgment in mind and advised that, you know, this might
9 cause issues for other markers in the case.

10 So, you know, we didn't ask for a fixed date as an
11 extension to file our summary judgment motion because, you
12 know, we're sort of in this position where we have one expert
13 who has not been offered yet, and that was Dr. Moline, because,
14 obviously, you just resolved some motions with respect to her
15 deposition, and I understand that Plaintiffs' counsel will now
16 offer her for a date. So we don't even have that deposition
17 scheduled yet.

18 So, you know, we're really looking for guidance from
19 the Court of when the Court would want us to file summary
20 judgments in light of the fact that we have so many depositions
21 going on in October past the current discovery deadline.

22 **THE COURT:** So which ones do you need in order to be
23 able to file your dispositive motions?

24 **MR. SCHROLL:** There's two -- there's Dr. Emory on
25 October 1st; Dr. Longo on October 8th. Those two were set in

1 the motion. Since then, Dr. Compton has been rescheduled to
2 October 23rd, I believe.

3 **THE COURT:** Oh.

4 **MR. SCHROLL:** And then we don't have a date for
5 Dr. Moline. And, you know, I don't know -- I don't expect
6 Ms. Kagan to have a date here right now, obviously, but I
7 assume that she could probably check and get one next week.

8 **THE COURT:** All right. If you're talking about
9 October 23rd, there's not going to be a way to keep you on the
10 April trial calendar. Let me go to Ms. Kagan and see where
11 Plaintiff is. As far as these depositions, those were all ones
12 that needed to be done by September 21st if we were going to
13 keep this schedule.

14 Ms. Kagan, where are we on that?

15 **MS. KAGAN:** The only issue actually is really
16 Dr. Compton, the October 23rd deposition. His deposition was
17 actually scheduled for today. All of the depositions that are
18 set for after the September 21st cutoff have been agreed to by
19 the parties and stipulations filed on the docket.

20 This week, when the Court set today's hearing for
21 today, counsel for AII requested a new date for Dr. Compton so
22 that they could appear here, all three of them, as well as a
23 deposition of Dr. Compton at a later point. I had explained
24 that Dr. Compton has an incredibly tight schedule and that the
25 date will not be soon, and then the soonest date Dr. Compton

1 was able to give me was October 23rd, which I offered to
2 Defendants, again noting that it's quite far out, and perhaps
3 we could split up; somebody covering the depo and somebody
4 covering the hearing for today. And the Defendants chose to
5 appear here today and move the deposition to the 23rd. So I
6 would urge the Court not to penalize the Plaintiffs and move
7 the trial date because this deposition had to be moved so far
8 out.

9 I'm confident I can get a date for Dr. Moline sooner
10 than the 23rd, and we have Dr. Emory, as counsel for Colgate
11 said, set for the 1st, and Longo set for the 8th.

12 **THE COURT:** So any of those, though -- my notion was
13 by agreement after September 21st only if it wasn't going to
14 affect the dispositive motions schedule. I think all of these
15 affect the dispositive motions schedule potentially, and I do
16 not want to have to move it off of April, but everything has to
17 be fully briefed by November 11th, which is when it's currently
18 set to be fully briefed, and, if not, then you're going to be
19 too close to the trial date to be able to have your dispositive
20 motions considered before trial, and that's the concern we've
21 got by packing all of these in so tightly.

22 I don't know -- Ms. Kagan, do you have a suggestion
23 for how we brief dispositive motions and get everything briefed
24 by November 11th, replies included?

25 **MS. KAGAN:** I guess I can begin by saying that at our

1 last conference, no Defendant had indicated what specific
2 depositions they needed for dispositive motions. And so I did
3 tell counsel for Colgate that I am a little bit surprised that
4 we have so many depositions that are necessary for their
5 dispositive motions since this isn't our first case together.
6 We've been trying these cases for years against each other
7 across the country, and they -- these are all known quantities.
8 None of these are their new experts, and there's volumes of
9 deposition testimony from them. So I am a little surprised
10 about the urgent need of these specific depositions in order to
11 file a dispositive motion.

12 That aside, again, I understand the issue with the
13 calendar and the motion schedule, but I also feel that the
14 prejudice to Plaintiff to moving the trial date from April
15 because a deposition was moved to October 23rd, because a
16 hearing was set and the Defendants asked for the deposition to
17 be moved, is really unfair to the Plaintiff.

18 And, certainly, with respect to Dr. Compton, he has
19 no new opinions in this case with respect to Colgate-Palmolive.
20 They have deposed him numerous times. They have cross-examined
21 him at trial. He has done no new work on Cashmere Bouquet and
22 has offered no new opinions in this case, and so I would hope
23 that Colgate could rely on the prior transcripts of his
24 testimony in the same exact accord that they have seen many,
25 many times before to be able to address him in a dispositive

1 motion.

2 And then that would leave us with Dr. Longo on the
3 8th, and I'm hopeful I can get Dr. Moline in before then, and
4 then we have a little bit more wiggle room on our motions
5 schedule.

6 **THE COURT:** So what that would look then is if we set
7 aside Dr. Compton, if you get Dr. Moline -- and I think a
8 condition of this would be you had Dr. Moline in before
9 October 8th. Then motions would be due October 12th. Your
10 responses to motions would be 21 days later, which would be
11 November 2nd, and then they would have a week and a half for
12 replies, which would take until November 11th.

13 **MS. KAGAN:** That is pretty consistent -- it's
14 actually more time than we would specifically get in
15 California. I accept that schedule, Your Honor. I obviously
16 can't speak for the Defendants.

17 **THE COURT:** So that is contingent on you offering
18 Dr. Moline before -- on or before October 8th.

19 **MS. KAGAN:** Yes, I will endeavor to do that.

20 **THE COURT:** And if it's after October 8th, then I
21 think there's not going to be a way to get this briefed in time
22 for the schedule that you're on for dispositive motions.

23 I will tell you that that has already extended past
24 what the clerk's office ordinarily would allow for briefing of
25 dispositive motions prior to trial. You're already closer to

1 trial with that than you should be. So I extended it as far as
2 I possibly can.

3 And, again, we've talked about this before. Whether
4 there are trials in April and what that looks like and what the
5 district judge would decide to do would be separate questions.
6 And so the district judge may still conclude that based on
7 either the COVID-related restrictions and/or the volume and
8 timing of the dispositive motions that it's necessary to
9 continue it; but if we go any further, I am going to have to
10 continue it. I won't be able to keep it on the April calendar,
11 even subject to whatever further developments there may be,
12 again with no promises as to what things may look like then or
13 what the district judge may ultimately decide that they want to
14 do.

15 All right. That is a possible schedule, at least.
16 I'm going to hear from all of the Defendants, but, Mr. Schroll,
17 let me go back to you first.

18 **MR. SCHROLL:** Your Honor, I'm sympathetic to
19 Ms. Kagan's statement about prejudice to the Plaintiff here,
20 you know, and Colgate and all the parties really worked hard to
21 schedule those experts before the MSJ deadline, and through
22 unfortunate events, those depositions were postponed, through
23 no fault of Colgate as to those depositions.

24 So, you know, Your Honor, I would suggest that
25 prejudice swings both ways here and that really it's not really

1 anyone's fault. This is just the -- what happens in this
2 litigation when you have a five-party case with 23 experts,
3 trying to schedule them all within a few weeks. And we were on
4 track to get it done, and, unfortunately, we just couldn't.

5 With respect to the Compton issue, Your Honor, I
6 don't have his report in front of me right now, as I sit here
7 for this hearing, but my understanding, the last time I looked
8 at it, was that it is true, as Ms. Kagan suggested, that we
9 have deposed him before, and he has performed testing as it
10 relates to Colgate's product. That has not changed, but my
11 understanding is that in this report he has issued what we call
12 a case-specific opinion about Ms. Bell's specific exposure in
13 this case, which is something that we would not have had the
14 opportunity to discuss with him in prior litigation.

15 As I said, I don't have the report in front of me
16 right now, but that was my recollection of why we considered
17 that deposition one that we wanted done in September before the
18 deadline, but like I said, Your Honor, I would have to review
19 the report to be absolutely certain, but that was my best
20 recollection.

21 **THE COURT:** All right.

22 **MS. KAGAN:** If I may be heard on that, Your Honor?

23 **THE COURT:** Is that Ms. Kagan?

24 **MS. KAGAN:** Yes. Just on that limited issue about
25 Dr. Compton and his potential specific opinion.

1 **THE COURT:** Okay.

2 **MS. KAGAN:** There is no specific Bell opinion. There
3 is a sentence in a declaration from Dr. Compton that adopts all
4 of the reports. Colgate already has the standard testing
5 reports, and he notes that an individual like Mrs. Bell would
6 be exposed to asbestos above background from use of these
7 products, and that is a general statement that he applied to
8 any individual who uses these products as intended, based on
9 his exposure studies. He has not reviewed or done exposure
10 studies based on Mrs. Bell's deposition testimony or the way
11 she specifically described using the product. He did a general
12 study based on reviews of deposition transcripts from other
13 cases from years ago. So there is no specific causation
14 opinion with respect to Mrs. Bell. It's more of a
15 hypothetical.

16 **THE COURT:** All right. Mr. Schroll, does that help
17 as to Mr. Compton?

18 **MR. SCHROLL:** I think that's what I said, Your Honor.
19 It sounds like he is going to relate an opinion specific to
20 Ms. Bell, not -- as opposed to just coming in and saying, I
21 found asbestos in Colgate's talc. So I think that's exactly
22 what I said, and I think that -- again, I don't have the report
23 in front of me that I can quote from specifically, but, you
24 know, that was my understanding was that he was going to relate
25 his prior work as -- and give a specific opinion about

1 Ms. Bell.

2 **THE COURT:** I don't know if that's Ms. Kagan said.

3 It sounded like she said that he was going to give a general
4 opinion about basic exposure or levels of exposure, but that he
5 hadn't reviewed anything specific as to Ms. Bell and wasn't
6 offering any opinions specific as to her. Maybe I
7 misunderstood.

8 Is that what you were saying, Ms. Kagan?

9 **MS. KAGAN:** That's exactly what I said, Your Honor.
10 It's the things that the testimony can give in a vast majority
11 of cases. He's done an exposure study. He's taken
12 measurements. He offered the opinion that any individual who
13 would use this product in a manner that it was intended to be
14 used would be exposed to these basic levels of asbestos from
15 use of that product and has not offered a specific opinion
16 about the quality or quantity or duration of Ms. Bell's use,
17 and any questions about Ms. Bell would be purely in the form of
18 a hypothetical.

19 **THE COURT:** All right. And, Mr. Schroll, maybe you
20 can help me. Is that different than what you were contending,
21 or what's the distinction you're making?

22 **MR. SCHROLL:** Your Honor, maybe perhaps you can have
23 the other Defendants weigh in while I frantically try to pull
24 up the report here.

25 **THE COURT:** All right. That's fair enough.

1 So let me go through just with regard to scheduling
2 and how we deal with this.

3 Mr. Thackston, what's AII's position?

4 **MR. GREVE:** Your Honor, this is Kurt Greve for AII.
5 We're comfortable with the dates that have been proposed by the
6 Court.

7 **THE COURT:** All right. So it would be dispositive
8 motions due October 12th, responses November 2nd, and replies
9 November 11th, understanding that's a tight turnaround, but it
10 at least gives you extra time to get the Plaintiff expert
11 depositions, to the extent you might want to have had those.

12 Does that work for AII?

13 **MR. GREVE:** Yes, Your Honor.

14 **THE COURT:** All right. Mr. Peck, for Cyprus?

15 **MR. PECK:** The same, Your Honor, those dates are fine
16 with Cyprus Amax.

17 **THE COURT:** And, Mr. Tomlin, for Whittaker Clark?

18 **MR. TOMLIN:** Sorry, Judge. I couldn't hit the mute
19 button.

20 **THE COURT:** That's all right.

21 **MR. TOMLIN:** Yes, we will strive to get those done.

22 **THE COURT:** All right. And so for all of you -- and,
23 Mr. Carruthers, I know you're just listening for Neslemur, but
24 anything you needed to add on that?

25 **MR. CARRUTHERS:** No, Your Honor.

1 **THE COURT:** All right.

2 **MR. GREVE:** Your Honor, just one quick clarification.

3 If we were able to file our motion sooner than the October 12th
4 deadline, would we still have the same response deadlines and
5 replies that are consistent with the rules, as opposed to
6 what's set forth in the schedule of October 12th, November 2nd,
7 and November 11th?

8 **THE COURT:** Right. So I think that's a fair
9 question. Mr. Greve, what would your proposal be?

10 **MR. GREVE:** Well, I mean, I think it's a situation
11 where we've been working hard to comply with the current
12 deadline.

13 **THE COURT:** Right.

14 **MR. GREVE:** You know, obviously, it never hurts to
15 have a couple of extra days, but if we had this on file, you
16 know, sometime next week, we just would hope that we'd be able
17 to keep the same time frames in terms of the response deadline
18 and the reply briefs.

19 **THE COURT:** Right. So I think the way it would work
20 is, ordinarily, if we're not following this abbreviated
21 schedule, they would have 30 days to respond. So I could
22 say -- I mean, if you file it early enough, they've got 30 days
23 to respond, but it still has to be no later than November 2nd.
24 So it would be whichever of those came first, and then your
25 reply would be 14 days, or November 11th, whichever of those

1 came first.

2 Is that what you're asking, I guess?

3 **MR. GREVE:** Yes, Your Honor.

4 **THE COURT:** All right. And I think that's the way I
5 would anticipate interpreting that, but let me go through and
6 make sure with everyone, and I'll start with you, Mr. Greve,
7 for AII. You could file it early. Their response is due 30
8 days, or November 2nd, whichever comes first. Your reply is
9 due 14 days thereafter, or November 11th, whichever comes
10 first. I don't think anything else is going to come first
11 because that's the date I'm using to -- that's the current date
12 on which everything would be fully briefed under the ordinary
13 deadlines. So that should, either way, get everything fully
14 briefed by November 11th.

15 And then as far as the other experts that are
16 otherwise designated during October, and I guess even for
17 Hannah in November, early November, none of those would affect
18 AII with respect to being able to stay on the schedule we've
19 proposed; is that right, Mr. Greve?

20 **MR. GREVE:** That's correct, Your Honor.

21 **THE COURT:** Okay. Good. Thank you.

22 And then, Mr. Peck, none of those other dates for
23 depositions would affect that for you all either, would they?

24 **MR. PECK:** That's correct, Your Honor.

25 **THE COURT:** All right. And Mr. Tomlin?

1 **MR. TOMLIN:** Correct.

2 **THE COURT:** All right. And before I go back to
3 Mr. Schroll and Ms. Kagan, then you understand if I adopt this,
4 it would be contingent on Dr. Moline being deposed on or before
5 October 8th, and it would require you to file a response no
6 later than November 2nd to any of the dispositive motions, but
7 if any of the Defendants file them early, then they're due
8 within 30 days, and then, again, November 2nd at the latest,
9 and then replies would be by November 11th at the latest.

10 Is that workable for you, Ms. Kagan?

11 **MS. KAGAN:** It is. My law motions department might
12 murder me, but it is.

13 **THE COURT:** Okay. All right. So then there's only
14 the issue as to Mr. Compton. Mr. Schroll?

15 **MR. SCHROLL:** Yes, Your Honor. I confess; I was not
16 the attorney who was slated to depose Dr. Compton today. So it
17 has been some time since I looked at this. It's,
18 unfortunately, not OCR'd and not searchable by the search
19 function here. I have been trying to read it. It seems,
20 though, that with the other Defendants agreeing to that
21 deadline that would be the default deadline for us; and to the
22 extent I find something that is not consistent with what
23 Ms. Kagan said, I will raise it with her.

24 **THE COURT:** All right. You can do that either by
25 finding an earlier date for Mr. Compton, or if it's something

1 where it looks like there's -- it won't necessarily affect the
2 dispositive motions, but that changes after you actually do the
3 deposition, then you can raise it, if you need, in the reply,
4 and we can determine whether that's something that warrants
5 anything further as far as consideration.

6 But it sounds like, at least from what everyone else
7 understands and what Ms. Kagan has said, that there's not going
8 to be anything different here from Mr. Compton than there has
9 been in any of the other cases where he's been an expert.

10 Ms. Kagan, is that fair?

11 **MS. KAGAN:** That's correct.

12 I can draw Mr. Schroll's attention to paragraph 26.
13 It's the last paragraph of the declaration. That is the
14 summary of Dr. Compton's opinions. Ms. Bell isn't specifically
15 mentioned. These are his standard opinions with respect to
16 Cashmere Bouquet based on the testing -- the product testing,
17 both bulk and air, that he has done on these products and the
18 sources.

19 **THE COURT:** All right. So that's helpful. Thank
20 you.

21 Mr. Schroll, anything else with that?

22 **MR. SCHROLL:** No, Your Honor. Just to clarify -- I'm
23 sorry. I was trying to handle this report. Is it
24 October 12th?

25 **THE COURT:** Right. October 12th is going to be your

1 dispositive motion deadline. Defendants can file before then,
2 and responses will be due 30 days out, per the local rules,
3 except that the outside deadline would be November 2nd. So in
4 any event, responses have to be filed by November 2nd for any
5 dispositive motion filed on or before October 12th.

6 I am trying to say that in ways that help clarify
7 rather than muddy it, but, essentially, the Defendants have up
8 until October 12th. The Plaintiffs have within 30 days, but if
9 30 days takes them past November 2nd, then by November 2nd, and
10 then the replies are due November 11th. And that is based on
11 the schedule we have now with Emory, October 1st; Longo,
12 October 8th; and Moline on or before October 8th; and Compton
13 on October 23rd, with the understanding that he's not offering
14 any case-specific opinion and would just be consistent with his
15 testimony in other cases.

16 If any of those things change, then that may
17 require -- or will require changing the dispositive motions
18 schedule, which would almost certainly require moving the trial
19 date.

20 And, again, just to make sure I'm clear, the piece
21 that I control is leaving you on that trial calendar to at
22 least potentially be heard in April, but right now, of course,
23 having an extended civil jury trial would be difficult, if not
24 impossible, and so there are many that are being continued as a
25 result. And so as part of managing all of those and managing

1 the dispositive motions in this case, the district judge who
2 ultimately has the case may end up moving it to another trial
3 calendar or setting it for a special session, and that's going
4 to be up to them; but for at least our planning purposes for
5 now, if you meet this dispositive motion schedule, then it at
6 least can stay on the April trial calendar for further
7 determination of that issue.

8 Is that clear enough for everybody? Ms. Kagan?

9 **MS. KAGAN:** Yes, Your Honor, thank you.

10 **THE COURT:** All right. Mr. Schroll?

11 **MR. SCHROLL:** Yes, Your Honor.

12 **THE COURT:** All right. So I think that takes care of
13 183, which is the motion to extend the dispositive motion
14 deadline. That's going to be granted, and, specifically, as
15 I've indicated, the dispositive motion deadline for Defendants
16 will be October 12th, the response no later than November 2nd,
17 and the reply November 11th; but if there are earlier filings,
18 that would be as we've discussed.

19 And then I believe there was a -- maybe one more
20 motion for a telephone hearing, 186. That would be granted by
21 this hearing, and that's both 158 and 186.

22 And now I am going to go to Ms. Kemp, and ask you if
23 I have addressed all of the matters that had a pending motion
24 today?

25 **COURTROOM DEPUTY CLERK:** Yes, Judge Peake, everything

1 has been moved on. Let me just double-check.

2 **THE COURT:** Sure. Take your time.

3 **COURTROOM DEPUTY CLERK:** Yes, Your Honor, everything
4 has been accounted for.

5 **THE COURT:** Thank you, Ms. Kemp.

6 All right. Let me just do a final pass-through.
7 Have we covered everything and resolved everything that you
8 have for today, Ms. Kagan?

9 **MS. KAGAN:** Yes, Your Honor. Thank you for your
10 patience with me.

11 **THE COURT:** All right. Thank you.

12 Mr. Greve, for AII, have we covered everything?

13 **MR. GREVE:** Yes, Your Honor.

14 **THE COURT:** Mr. Schroll, for Colgate, have we covered
15 everything?

16 **MR. SCHROLL:** Yes, Your Honor.

17 **THE COURT:** Mr. Peck?

18 **MR. PECK:** Yes, Your Honor, I believe we have.

19 **THE COURT:** All right. Thank you.

20 Mr. Tomlin?

21 **MR. TOMLIN:** Yes, Your Honor.

22 **THE COURT:** All right. Very good. So I appreciate
23 everyone's time. We'll go ahead and adjourn. I'm not going to
24 do a separate order. The transcript of this will be available
25 in case anyone needs to have that for the details, but,

1 otherwise, it will be based on what I announced here.

2 Thanks very much.

3 (END OF PROCEEDINGS.)

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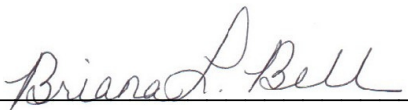
1 UNITED STATES DISTRICT COURT

2 MIDDLE DISTRICT OF NORTH CAROLINA

3 CERTIFICATE OF REPORTER

4
5
6 I, Briana L. Bell, Official United States Court
7 Reporter, certify that the foregoing transcript is a true and
8 correct transcript of the proceedings produced to the best of
9 my ability from an audio recording of the telephone conference
10 in the above-entitled matter.

11
12 Dated this 30th day of September 2020.

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15 
16 Briana L. Bell, RPR
17 Official Court Reporter
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